THE UNIVERSITY OF ALBERTA

PUNISHMENT: MEANING AND JUSTIFICATION

by

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled PUNISHMENT: MEANING AND JUSTIFICATION submitted by Bruce M. Olsen in partial fulfillment of the requirements for the degree of Master of Education in Philosophy of Education.

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ABSTRACT

There appears to be no agreement or consensus on the central issues relating to the social fact of punishment. In part, this is because until recently no resonably acceptable definition of "punishment" existed. The lack of consensus is also due to the fact that there is no theory about the justification of punishment that adequately explains the various aspects of the practice. In this thesis I have attempted to deal with those two areas.

The most important papers on the definition of punishment have been in response to J. D. Mabbott's 1939 paper entitled "Punishment". Of those, I have chosen to work mainly from Antony Flew's definition, using that definition to deal with the many points of criticism arising out of later works. Also, I have chosen to rely heavily on ordinary language usage in support of that definition.

As for justification, it seems apparent that the Retribution vs. Utilitarianism controversy is relevant mainly to theoretical discussion. In practice, both of these justifications are at work in each individual instance of correctly applied justice. It has been my concern, therefore, to seek a method of reconciling these two supposedly opposed theories of the justification of punishment.

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CHAPTER I

INTRODUCTION

Punishment is a social fact. None of us, except those of questionable sanity, takes pleasure in inflicting punishment on another individual. Yet, the need for an institution of punishment has become so much a part of society that a separate portfolio within the highest government of the land is charged, among other things, with the overseeing of legal punishment. Although punishment is a social fact, and although punishment for crimes that have been found out by the authorities is now such a common occurrence that it takes months for time to be allocated for a criminal trial to be conducted, the statements appearing before the public relating to criminal punishment are as confused as they must have been years ago.

We can find instances of punishment within our society in a great many areas. The most publicized one, of course, is punishment within the legal sphere. Tremendous amounts of time, energy, and money are spent yearly within our criminal justice system. The current estimates for the cost of keeping a single offender in a Federal Penitentiary for only one year are as much as $15,000. There are nearly 10,000 men incarcerated

in Federal Prisons in Canada today. The burden of this cost is carried by the law-abiding taxpayer. And incarceration is not the only cost. The police must be paid, the court houses with all the personnel required to process the offenders must be paid, and finally, the parole officers that monitor the offender's behavior upon release must be paid. Many provinces are either contemplating or already have legislation that will provide some compensation for the victims of crime. That cost is also paid out of public funds provided by the taxpayer. It is not surprising, then, that legal punishment is a very controversial subject.

However, the social fact of punishment is not restricted to the legal sphere. Instances of punishment occur in family situations, schools, voluntary organizations, games, personal relationships, business associations, animal training and probably other areas of life as well. In discussions, "punishment" is used even more broadly than would be indicated by the wide range of instances listed above. In addition to the practical situations where instances of punishment can be found, we also have to deal with "punishment" within religious discussion, metaphorical usages like saying that the weather is punishing the land, and inappropriate uses of "punishment" such as substituting

that word for "victimizing" or "revenge". With all this possible scope to work with it is understandable that some confusions exist regarding "edges" of the concept, if concepts have edges. What limitations are we to put on 'punishment' within considered usage? How, if at all, are we to reconcile our dislike for inflicting punishment with the social fact of the existence of the practice? These, among others, are the central questions of this thesis.

Four years ago I took a position as senior teacher in charge of the academic education within William Head Penitentiary--a Federal Minimum Security prison. Since that time, the prison has been re-classified to a medium security institution. I enjoyed working with the men, I was happy at being involved in their rehabilitation and I still take pleasure in those things. Soon after beginning teaching I found that the ideas I had regarding prisons, prison life, rehabilitation, and punishment were very much at odds with the realities of the "joint". More difficult to deal with than changing what had been my preconceptions of the fact of prison was coping with the forces that were threatening and challenging my most basic beliefs about fundamental philosophical concepts such as life, liberty, truth, honesty and other 'extras' usually not permitted

the serious academic philosopher. My attitude toward my role as an educator also came under close scrutiny. Somehow, there was little satisfaction in trying to explain how to solve two equations in two unknowns to a man whose liberty had been removed for 12 years, whose family situation was dissolving before his very eyes, who had lost his home, business, car, and most of all his personal associates. The problems of concern to that man were impossible to overcome. Worse than that, the administration of the prison either would not or could not allow the man any opportunity to deal with those problems in any direct way himself, and the classification officers who were assigned to the man to help him with his problems neither had the time, interest, nor ability to render any effective solution to such monumental life problems. I soon came to realize that the myth of rehabilitation was being supported by my very presence. It is very humbling and causes a lot of soul searching to come to realize that about all that one has to offer these men is an unbiased but still ineffective ear. It is through that feeling that I came to be interested in the social fact of punishment.

If I had taken an interest in the philosophical issues that are fundamental to considered discussions

on punishment before I left the University to teach, I would have undoubtedly written a much different thesis than this one. However, my interest was not the result of reading the philosophical papers in the journals, but rather the result of experience in a Federal prison. The philosophical hair-splitting present in the literature seems to me to not relate very closely with the reality of legal punishment at all. I, for one, cannot deal with human lives in that fashion. My approach to the problems of definition and justification of punishment will necessarily be influenced by the practical problems rather than the very narrow definitional approach. The activity of that cold-hearted analysis I happily leave to the professional academic philosophers.

I. CORRECTIONS

In discussing the topic of corrections with a friend of mine who is active in the John Howard Society in Victoria he said "You know, I'm simply amazed with the new approaches to corrections being taken both provincially and Federally. I was in the Spanish Revolution, I worked with the British in Africa, and now, I call Canada my home. I've seen a lot of sorts of punishment but still I'm amazed. You know, society has

murdered, shamed, maimed, and finally cajoled law-breakers. About the only really new thing that can be done is send them on a trip to Hawaii. I'll bet it would be cheaper than what we're doing now. Certainly none of the other approaches have worked, and unfortunately, I'm old enough to think that what we're doing now won't work either."

This sad but probably accurate comment reflects how little we really know about the extremely complex problems of crime and punishment. The technology of Criminology, borrowing, as it does, from Psychology, Sociology, Law, and Philosophy is simply not adequate to handle the problem. The shotgun methods used in corrections are not well founded in theory, have no track record (and in fact, some have negative track records elsewhere, e.g., the indeterminate sentence), and are not even clearly set out so that some sort of evaluation can be made of the program. One thing is certain, that the old excuse that inadequate staff is to blame for corrections not significantly reducing recidivism[1] cannot be used any more. The Solicitor

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[1] "Recidivism"--"habitual or chronic relapse, or tendency to relapse, into crime or antisocial behavior patterns." (Webster) Figures on rates of recidivism of offenders are the main measure of the effect of programs and approaches to crime. In theory, if the recidivism rate falls, the approaches being taken are better than the previous ones, and vice versa.

General's staff has increased enormously in the last few years, yet not much impact has been made of the criminal sub-culture. Crime rates rise, figures on recidivism and parole failures act like they were carved in granite, and the Solicitor General's payroll rockets.

> Perhaps, then, even the best prison personnel will not be able to change prisons significantly. Should this be the case, prisons will remain irrelevant to the correction of criminals and irrelevant to the direct victims of crime.[2]

II. THE CRIMINAL LAW

A large percentage of the philosophy articles discussing punishment focus on legal punishment, and in particular on incarceration as the main example of legal punishment. Prisons are "the end of the line" for those unfortunates who come to be under the care of the criminal justice system.

> The federal penitentiaries deal with the terminal cases. The place to stop the treadmill is in the courts or among the teenagers. We should recognize that we are overusing prisons. We should use them with restraint for the really dangerous and predatory, and use more alternatives for the others, fines, probation and residential centers.[3]

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[2] Donald R. Cressey, (Ed.) Crime and Criminal Justice (Burns and MacEachern, Ltd.) Toronto, 1971, p. 249.

[3] Mr. Outerbridge of the National Parole Board, as quoted in Time Magazine, Dec. 2, 1974, p. 16.

Mr. Outerbridge should also have added that the best place to look, if one is concerned about overuse of the prisons, is within the Canadian Criminal Code itself, since it is under that authority that persons get to prison in the first place.

Most of us idealistically hold that criminal law is the codification of our moral and ethical beliefs into rules which are to be followed by members of the society. Since the simple recommendation that such and such a behavior should not be practiced would not be effective in any except extremely simple and ordered societies, it is thought necessary to have a whole system of criminal justice to administer and uphold the law. The law, under this view, is a static embodiment of right and wrong. It is to be respected and obeyed because it developed slowly over many years and reflects the consensus of society regarding those actions felt to be intolerable and threatening. The law is what is best for society. Jerome Hall has been one of the main voices articulating this view of the law.

> Criminal law represents a sustained effort to preserve important social values from serious harm and to do so not arbitrarily but in accordance with rational methods directed toward the discovery of just ends.[4]

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[4] Jerome Hall, General Principles of Criminal Law (Bobbs and Merrill) Indianapolis, 1974, p. 1.

Recently, however, a much different view of the law has emerged. Under this view the law is seen as a means of control of various sub-groups within the society and is utilized by those groups holding the power structure of that society. The law reflects the wishes of certain interest groups and the full coercive power of the state is used to compel other interest groups to embrace those wishes. One of the major proponents of this view of the criminal law is Richard Quinney.

> Law is formulated and administered by the segments of society that are able to incorporate their interests into the creation and interpretation of public policy. Rather than representing the institutional concerns of all segments of society, law secures the interests of particular segments. Law supports one point of view at the expense of others.
>
> Thus, the content of the law, including the substantive regulations and procedural rules, represents the interests of segments of society that have the power to shape public policy. Formulation of law allows some segments of society to protect and perpetuate their own interests. By formulating law, some segments are able to control others to their own advantage.[5]

Undoubtedly, some laws exemplify one view, whereas other laws reflect the other view. There is obviously a very high consensus about the prohibition of murder, rape and offences against persons and property. But

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[5] Richard Quinney, Crime and Justice in Society (Little, Brown and Company, Inc.) 1969, p. 29.

there is much less of a consensus toward the prohibition of the so-called "victimless crimes" such as abortion, prostitution, crimes of "vice", and drug related offences. In most law, however, there are elements of both points of view. What is of interest here, though, is that the law itself must not be accepted without question in any discussion relating to crime and punishment. The essential fact is that "the interest-group"[6] approach better explains many of the problems we see in crime and law enforcement today than the more traditional view expressed by Jerome Hall.

As society becomes more complex, by virtue of an increased pace, a more chequered population, and more money and leisure time, the ability to strike a consensus diminishes. Concern for more social control grows and the criminal law is used increasingly as a means of gaining that control. It becomes easy to pass a law when there is a need to relieve emotional tension and reinforce the faith of those close to the legislative power structure. It is not anywhere as easy to enforce the law once it is passed.

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[6] Stuart L. Hills, "The Formulation of Criminal Laws", in The Administration of Criminal Justice in Canada (Boydell, Whitehead, and Grindstaff, Eds.), (Holt, Rinehard and Winston of Canada, Ltd., 1974) p. 4.

In those circles of society where legally prohibited behavior is not considered immoral or deviant, wholesale evasion of the law occurs. All of this does not go on without damage to the attitude that the authority of the law and legislature is to be respected. A person from these circles is able to wear his conviction like a badge. Instead of having any deterrent effect, contravention of the law is likely to have the effect of enhancing the position of the "offender" within his own people. Disrespect of the law and legal authorities becomes a common attitude. The really serious concern here is that this attitude is not held only by the "fringe" groups today. Many persons in the white and blue collar work force are gradually adopting this attitude in increasing degrees.

One of the main factors mitigating against respect for the law and authority is the growing feeling that the criminal law should not be involved in a person's private life. This controversy is not new, but as those persons and groups who are able to translate their wishes into law feel more threatened and increasingly use the law as support for their own values, the actual legitimacy of their position of control comes into question. Then the only difference between a problem

of criminality and one of a coersive political power struggle is the number of incidences of the behavior in question. As Mill has said,

> The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent more harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. Those are good reasons for remonstrating him, but not for compelling him, or visiting him with any evil in case he do otherwise.[7]

The Committee on Corrections has recommended that

> No Conduct should be defined as criminal unless it represents a serious threat to society, and unless the act cannot be dealt with through other social or legal means...To designate certain conduct as criminal in an attempt to control antisocial behavior should be a last step... If there is any other course open to society when threatened, then that course is to be preferred.[8]

Given these two positions, it is clear that criminal corrections are not an effective means of modifying human behavior for the better even though the word 'corrections' is part of the description of the whole legal justice system. Incarceration, or for that matter

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[7] J. S. Mill, On Liberty, Ch. 1, quoted from Harvard Classics (Collier & Son, N.Y., 1909) Vol. 25, p. 203.

[8] "The Basic Principles and Purposes of Criminal Justice," Report of the Canadian Committee on Corrections, 1969, pp. 11-20, Information Canada, Ottawa. Appearing in The Administration of Criminal Justice in Canada, Op.Cit., p. 14.

fines meted out in a court of law, is not a very effective way to help someone reform or to prevent persons from engaging in criminal behavior. This is especially true when we consider the drug related offences, or the so-called vice crimes. The situation with homosexuality, for example, was summed up by Stuart L. Hills when he said "...putting the convicted, consenting, adult homosexual in prison is...'a little like throwing Bre'r Rabbit into the briar patch'."[9]

It is a difficult thing to be brief in summarizing the implications arising out of the criminal law being involved in areas where there is not a high consensus within the society at large. One obvious fact is that large segments of the society are interested enough in the particular activities prohibited by law that victimless crimes represent to engage in wholesale evasion of the law. What happens, then, is that legitimate business cannot provide these services, leaving the field clear for the criminal element to fill the gap. The result is that much inflated prices can be asked, and since there is no opportunity for legitimate competition, the consumer of these services must pay

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[9] Stuart L. Hills "The Formulation of Criminal Laws", in The Administration of Criminal Justice in Canada, Op.Cit., p. 10.

the price. The obvious examples of activities falling under the scope of this discussion would be: all the "vice" activities, gambling, pornography, prostitution, and the like; and sale and distribution of restricted drugs as well as the possession of these drugs for one's own consumption. In effect, the criminal law established a protective tariff regarding these services. Legitimate business interests can not consider legally providing these services and yet they are in such demand that persons will take the necessary risks to get them.

The results of this "tariff" function of the law are numerous and frightening. Since the persons who are providing the services are not "legitimate" it means that the customer must participate in a segment of society that may be undesirable. In fact, the search for these services may be the only contact with illegal behavior the customer would engage in. This contact with the criminal element is very dangerous. In the case of drugs, there is no opportunity to be assured that the drug purchased is not falsely represented, and in fact, the drug could be of a fatal dosage, all unknown to the consumer. In the case of prostitution, the customer may well be risking disease, and bodily harm since there is no legitimate supervision and no recourse if the situation goes awry. Society loses as

well since the enormous profits gleaned from the use of these services goes untaxed. This added incentive is enough to draw more persons into providing the services and risk detection and conviction.

The "overcriminalization" of the law is crime producing in another way as well. In the case of drug usage, the very high risk of providing the hard drugs enables the "pusher" to command a tremendously inflated price. The financial pressure that the user is under forces him to engage in some form of criminal activity to pay for the drugs he wants or in some cases needs. This money is usually made by the user himself gathering a clientele of users to buy from him and thus support his own habit. Youths are constantly being encouraged to use drugs and so expand the market. Anyone who comes in contact with the criminal subculture because of seeking one of these restricted services soon knows where he can purchase drugs whenever he wants.

Another way that the user can pay for his drugs is to be involved in theft.[10] In the case of the hard drugs now, they are too expensive to be supported by

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[10] It is interesting that Dr. John Unwin, medical advisor to the LeDain Commission on non-medical use of drugs, testifying on a drug case in Vancouver said "the British system of giving heroin addicts their daily dose at a clinic has 'markedly reduced' criminal activity." (Vancouver Sun, May 3, 1975, p. 7).

petty theft like shoplifting and require that those persons who have a habit must become involved in some highly lucrative activity like robbery or the distribution of drugs.

Since most of the laws concerning the restriction of activities that are essentially acts of private morality are unenforcable, the police have to resort to unsavory methods of gathering their information. In attempting to gather enough evidence to support arrest, the police must rely on informers, false arrest, entrapment, and similar methods. The payment of money for information together with the complete lack of trust between the informer and the police results in a very fertile breeding ground for the police to become the informer, offering legal protection to the criminal in exchange for a participating share. Bribery, corruption and police demoralization cannot be avoided in that sort of atmosphere. Knowing, as they do, that such behavior not only exists but is common, the actual victims of arrest and punishment by the courts cannot help but feel resentment for, and alienation from the society and its criminal justice system.

The whole concept of deterrence is ineffective when the police are forced to attempt to uphold unenforcable laws and must face, and occasionally succumb, to

the temptations of the criminal element to enforce the laws on a selective and discriminatory basis. The normal moral obligation to uphold the law is meaningless in the face of such behavior on the part of the law enforcement authorities. Usually every attempt is made to cover up cases of police corruption, however occasionally a situation becomes serious or widespread enough that the authorities are forced to at least lay charges and attempt halfheartedly to prosecute. The news media feeds on the sensationalism that is possible in such situations and provides considerable copy to the public. The obvious result is that the validity of the whole legal system and especially crime control is brought into question thereby undermining the faith that the public may have in that system.

The amount of crime that is literally directly caused by the criminal law itself is very high. The extent to which the faith in the legal system and law enforcement agencies is undermined is threatening to the whole basis from which any possible deterrent effect might work. This is true because the tactics needed to attempt to enforce the unforceable laws draw these agencies into the light of disrespect. The financial rewards possible, because the criminal law functions like a protective tariff, make entry into crime look

very promising to many of our young men and women. Society loses in so many ways by having problems like drug addiction and distribution under the umbrella of the criminal law. If the profits were removed from the distribution of restricted drugs by making those drugs available through some government agency to those individuals wanting to use the drugs, then the criminal profiteering would vanish. The reduced price of the drugs (perhaps addictive drugs would be available through medical channels) would virtually stop the not so petty theft needed to support a habit under the wildly inflated prices the addict must pay at present. The people who pay ultimately are the law abiding citizens whose house is broken into, or who must pay too much for goods purchased in the stores because the store owner has to cover the costs of goods lost through shoplifting. The people who suffer from all this are not the criminals, but rather, the general body of society. Crime costs, and costs heavily. The public pays for the police salaries, the courts, the institutions, the parole agencies, and the welfare and social service agencies that are necessarily involved in dealing with the offender or his family. The public pays for the goods that are acquired by the criminals, if not directly by the loss of uninsured goods or money, then indirectly

by the increased insurance rates. The problems resulting from the "overcriminalization" of the law, by the criminal law being involved in areas that should be out of its domain, are not solvable within the framework of the criminal justice system. It is truly unfortunate that the correctional services are saddled with problems that are really, in the final analysis, social problems, not criminal ones. However, since the correctional services are saddled with the problems, they have had to bear the public criticism. Since the crime rate is not going down, it is argued, the fault must be that the penitentiaries are not reforming the criminals well enough.

III. "REHABILITATION"--THE MYTH OF THE CRIMINAL JUSTICE SYSTEM

The common view is that a man is punished for his crime then it is the task of the various correctional services to reform him. Most persons in society know that by far the majority of the offenders sent to prison will be released sooner or later. They also want to think that when the man is released, it is because he has been reformed. Of course, that view is in error. In the majority of cases the man is released because either he has legally completed that part of his sentence that requires him to be held in prison, or the

parole board has come to the conclusion that the man has a good chance of completing his sentence without further infringements of the law. Senator Hastings has put the matter very succinctly:

> I believe that parole is the only instrument or tool that goes anywhere near filling the objective of rehabilitation, the bringing of the man into society. You are removing the man from the mileu or environment where rehabilitation is impossible or next to impossible. You bring him back into or closer to society, to the natural surroundings where rehabilitation becomes possible. Naturally, you are going to have failures, but we surely must be prepared to assume that risk in this day and age of enlightened treatment of individuals and fellow human beings.[11]

Certainly this business about reform has gone wrongheaded within the Canadian legal system. The almost blind faith that has been placed in the abilities of the psychiatrists and social workers, by both the general public and those persons who have the responsibility of formulating the policies that effect reform, has had the effect of obscuring these very real problems. It is not my opinion that the psychiatrists, psychologists, criminologists, etc., are the culprits either. The real culprits are those persons who have failed to at least attempt to articulate clearly just what is meant by terms like "rehabilitation" and "reform".

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[11] Senator Hastings speaking to Mr. Street, Chairman of The National Parole Board, Proceedings of the Standing Committee on Legal and Constitutional Affairs, Wed, Dec. 15, 1971, p. 12:7.

Lacking definitional parameters the services have rushed headlong into tremendous expenditures in the name of reform but have not really known what they are trying to do in any but the most general terms. For this they have rightly been criticized. In discussions with persons at some of the conferences on corrections the point is often made that "men are sent to prison as a punishment and not for punishment."[12] However, it has never been made clear just what men are sent to prison for.

There has likely always been a very real need for clarification of the most fundamental concepts relating to the really pretty disgusting things that prison does to offenders. That need is certainly none the less now than it has been in previous years. Occasionally one sees articles like the one written by Ralph S. Banay entitled 'Should Prisons Be Abolished?'[13]

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[12] It is thought in correctional circles that this statement was first made by Mr. McLeod, former Commissioner of Penitentiaries. However, J. D. Mabbott (in "Professor Flew on Punishment (1955)" in H. B. Acton The Philosophy of Punishment (MacMillan and Co. Ltd., 1969, p. 125) attributes this statement to Sir Alexander Paterson. This statement has been elevated to a high political position. It has become the focus of a national debate as to whether or not we are mollycoddling our prisoners, and has been used to justify relatively pleasant surroundings as can be found in some of our prisons today.

[13] Ralph S. Banay 'Should Prisons Be Abolished?' Appearing in Donald R. Cressey (Ed.) Crime and Criminal Justice (Burns and MacEachern, Ltd., Toronto, 1971) pp. 271-280.

in which the point is strongly made that prisons are not working. In fact, he opens his article with

> The prison, as now tolerated, is a constant threat to everyone's security. An anachronistic relic of medieval concepts of crime and punishment, it not only does not cure the crime problem; it perpetuates and multiplies it.[14]

He continues on to say:

> Under favorable circumstances, we have the means of getting to the basic emotional factors that underlie delinquent behavior, and of treating them successfully. We can carry out a program of rehabilitation that is one in actuality, and not in name only. This program can be carried on only outside prison walls--that is, in a new kind of institution. No such institution now exists, but it would be a practical and wholesome investment to bring it into being at the earliest possible moment.
>
> It would be an institution so acceptable that persons subject to antisocial impulses would go to it voluntarily--as a patient now goes to a hospital--for professional guidance in the eradication or amelioration of the emotional disturbance. A large percentage of those whom we label as criminals can be reclaimed for useful, stable lives through techniques now available.
>
> At these hospital-like institutions, teams of experts (Psychiatrists, physicians, psychologists, social workers and teachers) would pool their skills to reach and extirpate from the personality of the offender the roots of the behavior that had forced the community to exile him.[15]

The problem of such an approach is that people have a strong tendency to accept it for the wrong reasons. If it is true that the social sciences have

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[14] Ibid., p. 271

[15] Ibid., p. 274

the abilities that Banay says they have, then what he suggests might be considered as an alternative. However, few people in either corrections or social science, if what I have read is any indication, actually believe that this is so.[16] The reason such an approach might be tried is that we all feel that the prisons are failing to provide the reform that society has come to expect that can be done almost at will, and since the prisons are failing then any alternative sounds good regardless of its validity. Senator Thompson put it nicely when he said:

> (The abilities of psychiatrists) is a very important area in which to reassure the public. We are developing psychological tools and so on, but it is my opinion that we have overemphasized the diagnostic abilities of some psychiatrists.[17]

Two of the major justifications for the practice of punishment are deterrence and reform. Deterrence

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[16] An article in The New Scientist by Jeremy Cherfas about Roger Ulrich, a noted behavioral psychologist, says, "...(Ulrich) no longer feels that pure behaviorism has all the answers. He admits that there is still a long way to go in developing the technology of behavior modification. He knows that work must continue and that the methods he and others advocate for teaching, in the broadest sense, are not yet perfect. He says, 'I would emphasize that many of the world's great behavior shapers cannot get their own children to pick up their shoes and put them in their rooms.'" (The New Scientist, November 21, 1974).

[17] Proceedings of the Standing Committee on Legal and Constitutional Affairs, Dec. 16, 1972, p. 12:12.

is certainly being eroded by the "overcriminalization" of the criminal law. The problems relating to the scope of the Criminal Law could be expanded considerably from the brief mention I have made above, but the fact remains that it is only under the authority of that body of law that persons are punished for criminal offences. If the law itself is mis-directed, the chances of persons voluntarily obeying the law are obviously drastically reduced. The deterrent effect, the threat of punishment under the law, is much less effective if it becomes more and more common for the usually law-abiding citizen to seek the goods and services prohibited by law. As law-breaking becomes easier, deterrence must be less effective. Reform, too, has not fared well. Unfortunately, the main area where it has been thought that reform could be achieved has been within the prisons themselves. Britain and the United States have experimented with sentencing procedures where a man is sent to prison for an unspecified length of time, his release being conditional on his being certified as reformed.

Briefly, the theory behind the indeterminate sentence is that if the main aim of sending a man to prison is to reform him, then it would seem best to not release the man until he is reformed. The responsibility for

certifying that the man is in fact reformed has fallen upon the institution and parole people in conjunction with a host of psychiatrists and psychologists. These people with their expertise and training are able, theoretically, to assertain whether there is much likelihood that the man will revert to criminal behavior. If they think that he won't revert they certify that that is the case and let him out, if not, not.

What has happened, instead of letting the men out earlier (as soon as they have been 'reformed' which was the initial reason for the indeterminate sentence), is that persons stay in prison for longer periods of time. The reason for this, of course, is that the psychologists and their army of back up personnel are not able to predict what a man will do or even what he is likely to do or not do. Since they don't have the instruments for evaluating the man they are not able to sign the form certifying that the man has reformed. They never know if he has or has not reformed and are not prepared to take the chance of being wrong.

There are other forms of indeterminate sentence that are not as dangerous as the psychologically based form. In B.C., at the Provincial level, an offender can be sentenced to 18 months definite and 18 months indefinite, for example. The basis for his being

released early in the indefinite part of his sentence is whether he has done anything to better himself, say schooling, or a vocational training, and his behavior within the institution--that is to say whether he has been a problem to custody. The criterion for determining the man's release is not based upon intangible evaluations of the offender, but rather based upon the obvious, tangible aspects of the offender--his self improvement, his reaction to authority, and so on.

Until such time as there are very good prediction tools for the evaluation of human behavior the psychologically based indeterminate sentence is a very dangerous form of sentencing. It strips the offender of his dignity and does not give him anything to work for. The basis for evaluation is so intangible that it is not workable. It sounds good in theory, but until psychological technology catches up with the requirements of the theory a form of indeterminate sentence based upon prediction of an individual's behavior should be avoided.

IV. PRISONS AND HOSPITALS

There is little question that the distinction between prisons, hospitals and sanitoriums is being blurred. The Canadian Penitentiary Service has

established a "Medical Centre" at Matsqui Institution for those persons thought to need psychiatric attention. Most hospitals have high security wards. When a person is committed to a psychiatric institution it is indeed very much like being in prison. All of this points to a strong need for much clearer talk about prison, punishment, rehabilitation and the like.

Talk about abolishing punishment or abolishing prisons must not be so loose as to suggest that a "new kind of institution" must be established. Talk about abolishing punishment seems to ignore the fact that 'punishment' is used in normal discourse in many other areas than legal punishment. Prisons are prisons by virtue of the fact that persons are placed there against their will by the courts for a crime. Punishment is punishment because someone has sufficient authority to impose (that particular) punishment on an offender for an offence and does so. "A new institution" is just a new name for a prison, and abolishing punishment means rather that particular punishments should not be used.

The Criminal Law, because it encompasses a large section of activity that should really be dealt with as social problems rather than criminal ones, is convicting persons that should not be convicted. Many

of those persons are being sent to prisons. For those persons, for sure, we are overusing our prisons. With the other persons that are being sent to prison, those convicted under sections of the Criminal Code about which there is a high degree of consensus within the society, many need not be sent to prison. Mr. Street, Chairman of the National Parole Board, has said:

> ...65% of those in prison are not dangerous... (they) commit property offences rather than offences against the person. They are not offenses of violence. There is no violence in the record. It is break, entry and theft, simple theft, fraud, and offences such as possession of stolen goods. They comprise the majority of inmates, and as I say, they are not dangerous in the sense that they are not likely to offer violence or assault anyone.[18]

Again, we are overusing our prisons because those persons need not be there. Surely there are other courses of action (e.g., probation, parole, guardian, etc.) open to the judicial system than to send those offenders to prison. A large part of the problem, then, is that there is not so much a need for prison reform as for a re-thinking as to what our prisons are for.

The kind of re-thinking that is necessary must begin with a clarification of the concepts involved. First, and foremost, is the concept of punishment.

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[18] Mr. T. G. Street, Q. C., Chairman, National Parole Board, from The Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Dec. 16, 1971, p. 12:12.

There is some talk of abolishing punishment. I fail to see how that can be done. Society will continue to have offenders and will continue having to do something to those offenders. Whatever they do to the offender is a punishment. Any restriction of liberty, any imposition of a penalty, any imputation of blame, if it is done for an offence by legal authority, is a punishment. If what is meant by abolishing punishment is to substitute other kinds of penalty for incarceration, then loose talk about abolishing punishment does little to further the discussion.

> One thing is definite: penitentiaries are necessary. Many social deviants need to be isolated from society, both to protect society and to help them to resocialize themselves and to become law-abiding citizens. The public has been very critical of our penal system but society must also play its role. The Government has a key role to play but I think that society has a duty to participate to help change the system.[19]

If, as it seems, we are going to be sending persons to prison, it must be <u>for</u> some good reason. They must be placed there because society feels that that is the only course of action left. And to send a person to prison instead of hospitalization (say) is not to use at least that course of action (hospitalization) first. So, we must only send persons to prison for some act

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[19] Mr. Goyer, past Solicitor General speaking to the <u>Standing Committee on Legal and Constitutional Affairs</u>, minutes of Wed., Dec. 15, 1971, p. 11:6.

over which he had control. What is implied, of course, in that position is that the concept of responsibility needs to be a very well founded cornerstone of any workable philosophy as regards legal incarceration. Lady Barbara Wootton's concerns about the "withering away" of the concept of responsibility and her concerns about the blurring of the distinctions between penal institutions and mental hospitals are well known. At the present time in Canadian prisons there is no opportunity for a man to make even the most elementary decisions about himself as a citizen. He has been stripped of responsibility by the current emphasis placed on psychological counselling and the move by the Canadian Penitentiary Service to embrace the "therapeutic community." The actual effect of this, as Lady Wootton has observed, is almost the opposite of the intent.

> Anyone with practical experience of offenders will have known some among them who are apparently totally lacking in regard for other people, and at the same time totally unresponsive either to reformative treatment or to such punitive measures as it is nowadays thought proper to impose. Such people used to be thought extremely wicked: today they are classified as cases of mental disorder. Paradoxically, this has the effect that, if you are consistently (in old fashioned language) wicked enough, you may hope to be excused from responsibility for your misdeeds; but if your wickedness is only moderate, or if you show occasional signs of repentance or reform, then you must expect to take the blame for what you do and perhaps also to be punished for it.[20]

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[20] Barbara Wootton, Social Science and Social Pathology, (George Allen and Unwin Ltd., 1959, p. 250-251).

V. OVERVIEW

The whole concept of rehabilitation needs to be explored in any thorough discussion of the Canadian Criminal Justice System. The Report of the Canadian Committee on Corrections has said:

> The Committee believes that the rehabilitation of the individual offender offers the best long-term protection for society, since that ends the risk of a continuing criminal career. However, the offender must be protected against rehabilitative measures that go beyond the bounds of the concept of justice. Some modern correctional methods, such as probation, suspended sentences and medical treatment are part of the arsenal of sanctions but are not conceived as punishments. Their purpose is rehabilitative. Whatever their purpose, however, it cannot be more effective in practice than moderate penalties. Treatment is not more humane than punishment if it imposes more pain, restricts freedom for longer periods, or produces no results regarded as desirable by the individual concerned.[21]

The committee is surely right in this view. Very few of the writings on corrections take a hard look at the effects of the justice system on the individual offender. Programs and policies are established seemingly for the benefit of either the political climate or the administrations of the various correctional branches themselves. Programs that are only token in nature are numerous, while the public is led, by publicity, to believe that those same programs are

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[21] Canadian Committee on Corrections, Op.Cit, p.17.

fully operational and successful. Policies that have not proved to be effective in any institution in Canada are still instituted in new or changing administrations because the theory behind the policy sounds desirable.

However, the real problem of coming to some understanding of rehabilitation is that the whole concept within the Canadian system of corrections is a myth. By saying that the prisons are rehabilitating their inmates, the society is better able to settle its conscience regarding the very existence of its prisons. It is not so severe to send a person to jail for an act that is essentially a situation of private morality when in the same breath it can be said that that person will be rehabilitated while he is incarcerated. However, as J. W. Mohr of Ottawa's Law Reform Commission has said "Rehabilitation shouldn't be a justification for long sentences. Prison is not a place for rehabilitation."[22]

Somehow, in the Canadian approach to criminal justice, the cart has gotten ahead of the horse. There are no attempts at any reasonably thorough going statements about the admittedly complex purposes of our criminal justice system. It really does seem that the right hand does not know what the left hand is doing

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[22] Time Magazine, Dec. 9, 1974, p. 15.

and vice versa. If more effort could be spent on sorting out the theoretical inconsistencies some headway could be made in turning what has been referred to as a national disgrace, our Criminal Justice System, into a really effective instrument in crime prevention and social protection.

It is hoped that this thesis might at least help to clarify two of the fundamental points involved in the confusion. The first point that needs clarification, and one that has been mentioned above, is that "punishment" is used in a very confusing variety of ways. Talk about abolishing punishment does not square with theoretical definitions of the term. It is very important, therefore, that we come to understand as exactly as possible what "punishment" means. Only then will we be able to make sense of the very divergent opinions being expressed as regards the practice of punishment within our society today. In brief, the definitional problems relating to "punishment" come down to deciding: 1) if there is a core meaning to the term, 2) if it is found that there is a core meaning, what limitations are implied by that meaning as regards normal ordinary language usage, and 3) what are the criteria that comprise that meaning.

The second area, and one that is much more complicated than the definitional problems of punishment, is the justification of the practice of punishment. We have seen how deterrence is being eroded away by the disrespect of the law caused by the law being involved in areas of human activity that it shouldn't be. Also, the fundamental concept of individual responsibility is being eroded away by the emphasis on psychology and the "therapeutic community." The whole use of reform as one of the justifications for punishment seems to be misdirected by focusing as it does on the prisons.

The two main theories on the justification of punishment (Retribution and Utilitarianism) are pitted one against the other in the literature. As it stands, the retributive theory appeals to the logical mind. The retributivist says "punish him because he broke the law"; the utilitarian says "punish him only if more good results from the punishment than evil if he were to go unpunished." The utilitarian approach appeals more strongly to the humanist elements within us. Originated by Jeremy Bentham in the late 1700's, the Utilitarian theory is currently not in good philosophical repute. It has been found difficult to defend because many of the terms and concepts upon which it

relies are very illusive. A phrase like "an action is right if it results in the greater amount of pleasure or happiness in the world at large" is very hard to support when the pressure is on. Concepts like "deterrence" and "reform" are obviously utilitarian in nature. In reality, as opposed to philosophical discourse, both retribution and utilitarianism are thought to exist. In philosophical discourse, they are thought to be irreconcilable. I intend to show that they are not only reconcilable but that they in "the real world", do function as supportive of each other. It is only by establishing a bridge between these two theories that we can hope to make any progress on the theoretical foundations of our criminal justice system.

CHAPTER II

THE MEANING OF PUNISHMENT

> General interest in the topic of punishment has never been greater than it is at present and I doubt if the public discussion of it had ever been more confused.[1]

Although Professor Hart was writing in 1959, his statement is no less applicable today. Editorials on the topic written from widely differing positions appear at fairly regular intervals in the daily papers, politicians continue to make confusing speeches and the courts still hand down questionable decisions. Contemporary approaches to child raising are not any more settled as regards maxims like 'spare the rod and spoil the child', Dr. Spock notwithstanding. Philosophically, the discussion continues, however there has been a major contribution to the discussion since what Acton refers to as " ... the main accounts of punishment that were before the philosophical public in 1939 ... "[2] I refer, of course to the "Flew-Benn-Hart'[3] definition

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[1] H. L. A. Hart, 'Prolegomenon to the Principles of Punishment', Presidential Address to the Aristotelian Society 1959-60, p. 1.

[2] H. B. Acton, The Philosophy of Punishment (Macmillan, 1969) p. 9.

[3] McPherson, Thomas 'Punishment: Definition and Justification' Analysis, October, 1967, p. 21.

of 'punishment'. This definition seems to have been widely accepted and has clarified at least one major issue: the separation of the concept of punishment from the justification of the practice of punishment. In this chapter I intend to explore only the definitional side of the issue.

Since what we will be exploring is so closely tied up with the whole idea of definition, I want first to clarify what we are doing that is different from dictionary definitional activity. The extent to which ordinary language can be used as the authority, and the rules governing usage in considered statements will be briefly mentioned. Definition as a means of analysis is itself misunderstood. A short section on just what kinds of errors can be made and avoided in the process of seeking a usable definition will set the framework for the actual analysis of the concept of 'punishment'.

First, we will examine 'punishment' by exploring each of the criterion in the 'Flew-Benn-Hart' definition. A note to this is McPherson's point that meaning and justification cannot be entirely separated. Two additional points (related aspects of 'punishment' and the implications of blame) will lead us to an investigation of the major areas of usage of 'punishment'. McCloskey's paper will serve as the arena for that discussion. Finally, we will briefly consider the important concepts of 'offence', 'offender', and 'authority'.

I. THE DICTIONARY-MAKER AND THE PHILOSOPHER

The lexicographer succeeds in his job if he is able to outline what the uses or senses of a particular word are. He need not list all the uses, of course, but at least the more common ones of a particular word or concept must be taken into his account of the definition of the word. The dictionary-maker is not primarily concerned with clarification of, or ambiguities within, the concepts they are listing, while hopefully the philosopher is.

The philosopher's main activity is the exploration of concepts with a view towards concept clarification. That is not to say that the dictionary is not a very useful tool, but that it is not to be regarded as the authority on a word's meaning. Ordinary language usage, while being of considerable interest to both the dictionary-maker and the philosopher, is the raw material for the philosopher and the authority for dictionary-maker. Ordinary language is not to be regarded as the final authority on the word since the normal usage is not the result of considerable reflection on saying exactly what one wants to say. This "considered" usage gets closer still to the meaning of the concepts the philosopher is dealing with. However, it still has to be closely searched for ambiguity and

consistency of usage. In fact it may be that ordinary usage stands in the way of the philosopher. The simple fact that a word is used in normal speech in an unconsidered fashion without problem can lead one to think that there is no problem in the meaning of the term where in fact considerable ambiguity can be found to exist.

The other task of the philosopher as distinct from the dictionary-maker is to formulate the rules for the usage of words and concepts under analysis. If he can succeed in doing that he has gone a long way to unravelling the problems caused by the less precise usages of terms.

'Punish' and the derivations ('punishes', 'punished', 'punishment', etc.) have very open meanings. The limits of the usage of these terms are not at all clear. They have metaphorical usages (Clay punished his opponent, Ford punishes its cars), normal ordinary language usages (the child was punished for staying out too late), and technical usages (Judge: "Your punishment will be three years of incarceration.") among others. Since these categories are not clearly separable, further complications are added to the task of clarification of the concept.

Even within the relatively restricted area of the considered usage there is no real consensus as to the meaning of the terms. As we look into some of the older writings on the concept there is little agreement where definition-like statements are used as foundations (propositions) upon which the various positions were built. Consider, for example: " ... punishment is a reaction of the whole community against conduct that weakens it,"[4] " ... punishment is essentially the 'annulment' of the wrong act, its 'undoing' or 'cancellation',"[5] " ... forgiveness is opposed to punishment,"[6] " ... punishment is essentially an expression of moral condemnation,"[7] and "it is important not to lose sight of the fact that punishment, by definition, is 'of an offender' and 'for an offence'."[8]

There are many more examples, but in fairness it should be said that these men were not attempting to give a thorough going definition of the word. Their

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[4] Acton, op.cit., p. 10, attributed to Bradley.

[5] Ibid., p. 12, attributed to Bosanquet.

[6] Ibid., p. 13, attributed to Rashdall.

[7] Ibid., p. 14, attributed to Ewing.

[8] C.W.K. Mundle, postscript (1968) to 'Punishment and Desert', reprinted in Acton, Op.cit., p. 81.

statements may be somewhat taken out of context as well. But the fact remains that no thorough definition existed in 1954, the time of the latest quote (by Mundle). In fact there was not a good attempt at sorting out the definitional problems of the concept. That did not stop the authors from writing however, and in the absence of a workable definition any definition-like term could be considered as an attempt at definition. And these were the considered positions of able philosophers, not a collection of quotes taken from the local newspaper.

Since we will be referring to the activity of definition throughout this chapter, it is important to understand just what it is that we can expect from this activity and what errors can be expected to be waiting to be committed.

II. DEFINITION IN GENERAL[9]

When a phrase like 'the definition of punishment' is used, there is a strong tendency to assume that there is one definite definition of which we are speaking. Of course this is simply not true. If there was one

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[9] The following discussion owes much to the discussions on definition in Abraham Kaplan, The Conduct of Inquiry, (Chandler Publishing Company, 1964) pp. 39, 64, 72, 102, 270.

acceptable definition usable for the considered statements written about the subject, an appeal to that definition would settle a lot of the controversy surrounding the topic. Especially within the social sciences (and I would include legal inquiry, criminology, and some of the papers relating to these areas published in philosophical journals as representative of the social sciences) there is a tendency to regard definition in the same manner as it is regarded in say mathematics, logic, or the natural sciences.

I feel that it is important that we consider exactly what we are doing when we talk about definition as regards "open-textured" concepts like punishment. In a strict sense of the word, definition is an attempt to provide a set of synonymous terms that are mutually replaceable. When the point is reached that such a set of terms exists we say that the terms are defined. More loosely we refer to definition as any process which clarifies meaning. Philosophy being the activity of making considered statements about concepts under investigation that it is, we are led to imagine that when the word 'definition' is used that it is used in the strict sense. In fact, more often than not, the loose sense of the word more closely describes what is being done.

Various types of definition are discussed in Kaplan

Briefly they are:

(1) Scientific - Mathematical Definition

(a) Logical Definition - a symbol (or term) is introduced which should stand as a substitute or abbreviation for a set of formulae or statements.

(b) Semantical Definition - the process of assigning a verbal meaning to a newly introduced symbol (a verbal explanation of a logical definition).

(c) Real Definition - the process of establishing propositions of equivalence between two abstract entities. This form of definition usually involves impirical qualities.

(2) Non-Scientific Definition

(a) Implicit Definition - used where a word or symbol which already has a vague meaning is being given a new exact meaning that is as nearly as possible the same as the old meaning.

(b) Explicit Definition - the process whereby all the factors or parameters of a concept are definable (or at least the limits of their definability are known) and so the concept is clarified, its limits known, and can be analyzed on that basis.

(c) Definition by Abstraction - two propositions have the same meaning if they are given the same weight by all observations, and the meaning they have is nothing other than the class of all propositions which have the same meaning they do.

(d) Pseudo Definition - not a translation at all, even a partial one. The rules constitute a verbal bridge between theory and observation without presupposing or establishing any identity of meaning.

These categories are not mutually exclusive and are not intended to be exhaustive of all types of definition. Nevertheless they serve to illustrate the various sorts of definitional activity that exists. Philosophically, Kaplan could be criticized for the ambiguity that is apparent in the categories he has mentioned, but the fact remains that there are very different sorts of approaches to the activity of definition.

In definition of 'punishment' we are probably dealing with Kaplan's 'pseudo-definition'. At best we could have an 'implicit definition'. Flew's attempt at defining punishment is a good attempt at what Kaplan calls explicit definition, but all the parameters of the concept are not clearly defined without ambiguity.

This discussion is not intended to be critical of the activity of definition or disparaging towards the attempts that have been made but rather an effort to show that when we say we are talking about a definition of "punishment" what we are really talking about is a "verbal bridge" that allows us to form connections between theories and observations about both our language and the practice as a social fact. One mistake that can lead us into confusion would be to assume that our definition is much further along the range of possible

definitions toward the strict sense of 'definition' than it really is. We have no set of synonymous terms which can be interchanged without ambiguity. We are at best mapping out the essential parameters and attempting to establish their respective ranges of applicability.

III. LIMITATIONS IN THE ACTIVITY OF DEFINING 'PUNISHMENT'

The accepted approach to an investigation into the concept of punishment is to first consider the logical definitional considerations, then from that basis explore the more difficult aspect of the theories that are used to 'justify' the practice. McPherson argues that " ... it it difficult to separate justification from definition."[10] He also criticizes the Flew-Benn-Hart definition of punishment as being too suitable for the retributivist position of the justification of the practice of punishment.

> It might be that Benn and the others are trying to give a dog a good name. Perhaps the operation they are engaged in is a sort of philosophical de-fusing, or neutralization, or kicking upstairs. To define 'punishment' in a way that clearly owes much more to retributivism than it does to utilitarianism is, in a way, to honour retributivism. What could be grander than to be, to the exclusion of your rivals, set out in front as the expression of the meaning of an important concept?[11]

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[10] Thomas McPherson, 'Punishment: Definition and Justification', Analysis, October, 1967, p. 25.

[11] Ibid., p. 22.

The whole purpose of definition is to map out the appropriate areas of the concept. Whether or not the definition "owes more" to one theory or another is not what is at issue here. What is at issue is whether the definition is as accurate as possible. The most acceptable definition in the literature to date is the same one that McPherson is criticizing. The need to challenge that definition is not diminished by its acceptance, but the questions are not whether the definition fits a theory but whether the definition exactly marks out the normal considered usage of the word.

However, McPherson is right when he mentions that it is difficult to separate the question of definition and justification. The question of the justification of punishment in many ways will go hand in hand with the question of the definition of the concept. The usage of the word may not be reflected in the practice of using punishment as a means of rule obedience behaviour among or on the general population (or children, or dogs). However, the question of justification will be bound up in confusion between the justification of punishment theoretically and the justification of the practical use of punishment today. There is a lot of controversy concerning whether the way punishment is used today is achieving the results expected from the

theoretical positions. Perhaps if the practice of punishment were achieving these results there would be little confusion around the concept. But the practice is not successful and there is confusion. But there is still merit in proceeding as though the two concepts, the definition and the justification of punishment, could be separated. At least in this way a position is reached that can be analyzed and amended if necessary. We can then use the definition to show where it is applicable to the theories of justification advanced or where it departs from them. The analysis of the theories of justification will thus be useful in helping to sharpen the definition, if necessary. The two are connected as McPherson says, but there is value in treating them separately.

IV. THE 'FLEW-BENN-HART' DEFINITION OF 'PUNISHMENT'

Already noted above is the fact that the 'Flew-Benn-Hart' definition of 'punishment' has been a turning point in the writings on the topic. Flew's contribution was published in 1954, Benn's in 1958, and Hart's in 1960.

Each of Flew,[12] Benn,[13] and Hart[14] has used slightly different words to outline the parameters of "punishment" and each has used five conditions which have to be satisfied if the situation in question is to be properly described as "punishment". For each of the criteria I am going to use each of the above philosopher's wordings and list them chronologically. The slight shifts in the wordings will be important for the discussion of the criteria.

(1) The First Criterion, then, is:

- it must be an evil, an unpleasantness, to the victim (Flew)
- it must involve an evil, an unpleasantness, to the victim (Benn)
- it must involve pain or other consequences normally considered unpleasant (Hart)

(2) Secondly:

- it must (at least be supposed to) be for an offence (Flew)
- it must be for an offence (actual or supposed) (Benn)
- it must be for an offence against legal rules (Hart)

(3) Thirdly:

- it must (at least be supposed to)be of the offender (Flew)

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[12] Antony Flew, 'The Justification of Punishment', reprinted in Acton, Op.Cit., pp. 83-102.

[13] S. I. Benn, 'An Approach to the Problems of Punishment', Philosophy, Vol. XXXIII, No. 127, Oct. 1958, pp. 325-341.

[14] H. L. A. Hart, Op.Cit., pp. 1-26.

- it must be of an offender (actual or supposed) (Benn)
- it must be of an actual or supposed offender for his offence (Hart)

(4) Fourthly:

- it must be the work of personal agencies (Flew)
- it must be the work of personal agencies (i.e. not merely the natural consequences of an action) (Benn)
- it must be intentionally administered by human beings other than the offender (Hart)

(5) Fifthly:

- it has to (be at least supposed to) be imposed by virtue of some special authority (Flew)
- it must be imposed by authority (real or supposed), conferred by the system of rules (hereafter referred to as "law") against which the offence has been committed (Benn)
- it must be imposed and administered by an authority constituted by a legal system against which the offence is committed (Hart)

(A) The First Criterion.

Historically we can see that the phrasing of the criterion has changed from Flew through to Hart. The words "to the victim" have been dropped and the concept "normally considered unpleasant" have been added. Flew's phrasing of the point was open to criticism since it would not support the fact that many persons in the prisons at the moment are pleased to be there over the other alternatives open to them (skid row, etc).

Further, the words "to the victim" provides an opening for the old criticism that the retributivist position is one of pain for pain's sake. Although they do not want the definition to be too supportive of the retribution justification on punishment, neither do they want to be open to the possible criticisms that can be made against that position.[15] They view their task as one of making "proposals"[16] to be considered by philosophers and others in future discussions. Hart's final statement of the criterion allows for the infliction of pain or unpleasantness but does not leave him as open to the above criticism.

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[15] McPherson, Op.Cit., p. 21, says "This definition obviously fits the retrivutive view much more easily than it does the deterrent or reformative views". Although this is true, I don't think that that criticism is damaging. Benn's justification of punishment is clearly utilitarian.

In Acton's introduction to his book (Op.Cit.) he discusses Bradley's work on punishment. He says Bradley's position was that "the essential characteristic of punishment is 'the destruction of guilt, whatever the consequences'." (Ibid., p. 10) This definition owes more to retribution than any of the other theories as well, but it goes nowhere. In a later essay, Bradley said that "punishment is the reaction of the whole community against conduct that weakens it." (Ibid.)

Bosanquet said "punishment is the 'annulment' of the wrong act." (Ibid., p. 12)

A. C. Ewing said "punishment is an expression of moral condemnation." (Ibid., p. 14)

These 'definitions' also serve the utilitarian view more than the retributivist view but it would be difficult to argue that they are a better approach to describing the criterion for the application of the label "punishment" to any particular action.

[16] Flew, Op.Cit., p. 84.

McPherson points out that "there is an ambiguity in 'involve' and 'considered' in the sentence 'it must involve pain or other consequences normally considered unpleasant'."[17] He continues to say that there is no reference as to whom is doing the considering or mention of what 'involve' is meant to mean. If we take 'involve' to mean 'to bring into connection' or 'have as a part' then part, at least, of the punishment handed down would have to include pain or unpleasant consequences. Also, the phrase 'consequences normally considered unpleasant' is ambiguous and in a more dangerous way than 'involve'. If we assume that they meant us to understand that the offender would consider the punishment as painful or unpleasant then McPherson rightly observes that many of the punishments that are handed down are neither. If, on the other hand, we are to think that the phrase refers to the punisher, then the concept of punishment is a strange one indeed that considers the punishment from the point of view of the judge rather than the offender. If this last meaning is to be taken, we would have to look very closely at the third criterion ("of an offender") since it is he to whom the punishment applies. I think it is safe to

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[17] McPherson, Op.Cit., p. 22.

assume that what they meant to say is that punishment is to involve pain or consequences normally considered unpleasant to the offender.

This discussion need not be restricted to legal punishment. A mother who attempts to spank a son who is too old to be offended by that action would have to revise her approach to administering punishment as well. Perhaps she would be better off to not allow the boy to use the family car or place an early curfew on him for his transgressions. Such an action might be considered to "involve pain or consequences normally considered unpleasant" whereas spanking would not.

It is not the case, however, that the above criticisms challenge whether the action is to be called a 'punishment', but rather whether it is an 'effective' (or 'good', or 'appropriate', etc.) one.

(B) The Second Criterion.

Hart in his definition specifically excludes usages of 'punishment' other than the legal use. Benn, however, did not specifically limit his case, and Flew speaks of "a term in an old-fashioned public school".[18] He, presumably, is not relegating any usage other than

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[18] Flew, Op.Cit., p. 85.

legal to the category of "sub-standard". Any solid working definition of the concept of punishment must take into account the usage of the word as it is used normally in everyday discussions (whenever the word is at least used correctly). Flew's and Benn's phrasing of the second criterion (it must be for an offense (actual or supposed)) would be more useful than Hart's approach.

If we are to take Flew's wording and apply it to a practical situation, one weakness arises. Consider a motorist from outside the province who was caught for speeding along a highway. Assume that when he was taken to court (after not paying the fine) he was able to show that all the speed zone signs had been vandalised and so he could not have known that there was a speed zone where he was ticketed. He would be released and not charged. Even in a legal situation where there is a possibility that the accused could not have known that the rule or law he broke affected his situation at the time of the 'offense', then there is no "punishment" inflicted. Flew does not mention that the offender should in normal circumstances have knowledge of the rule under which he is being tried. Although ignorance of the law is no excuse in the court's eyes, in practice if the ignorance of the law can be shown

to be the fault of someone other than the offender he would not be found "guilty."

An example from outside the law is easier to illustrate the point. When a house-broken pet breaks his training and ruins the rug, the pet would be punished in the majority of households. If however, his training had not started when the 'offence' occurred, the animal would not be punished, in the strict sense of 'punished', because it did not know that there was a rule prohibiting his behaviour. Knowledge by the offender of the offence in question should, in most circumstances, be a criterion of imputing guilt.[19]

If the 'offender' had no knowledge we would not say that he was 'guilty' but rather that he was 'innocent' of the offence. The concept of 'offence' implies either innocence or guilt in any particular case.

"(That punishment cannot be inflicted on the innocent) can be shown by the fact that punishment is for something. If a man says to another 'I am going to punish you' and is asked 'what for' he cannot reply 'nothing at all' or something you have not done'."[20]

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[19] The observation is made by Mundle that it would be morally wrong to punish a child if he had not been previously told that the action was forbidden. And also "if one chastised a child for doing something it had not been forbidden to do, the infliction of pain might be justified as a means of inculcating a desired habit but, in that case, it should not, I think, be called a 'punishment'." Op.Cit., p. 79)

[20] Anthony M. Quinton, 'On Punishment', reprinted in Acton (Op.Cit., pp. 55-64), in particular see p. 59.

And again,

> "I am going to punish you for something you have not done' is as absurd a statement as 'I blame you for something for which you were not responsible'. Punishment implies guilt."[21]

So, bound up in the second criterion is also the point that one cannot punish the innocent in the normal considered usage of the word. No doubt bizarre cases could be constructed where innocents were 'punished' but we should not question the language as much as the morality of the action in these cases. After analysis we would probably want to call these actions (in considered terminology) 'victimization' or 'revenge', not 'punishment'.

(C) The Third Criterion.

The concept of 'offender', and that of 'offence', is logically the concept of a rule (or law). You cannot have an offender if you do not have a rule to be broken (or 'offended'). This point is the main starting place for the argument that rule-breaking and punishment are just two sides of the same thing. If that argument were true it would mean that the retributivist position is reduced to a simple tautology. Quotes from

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[21] Ibid.

Mabbott might be used to argue that they are the same.[22]

If punishment and rule-breaking are the same then one cannot argue that one justification for punishment is that the man broke the law (or rule). That fact (that he broke the rule) is a sufficient condition for punishing him. It is not, however, a necessary condition for punishing him. Whether punishment and rule-breaking are the same will be discussed more fully

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[22] In his 1939 paper, a position which he later amended, Mabbott restricted the meaning of punishment to legal punishment. This restriction, and hence the very close connection of punishment with purely legal offences, has given apparent validity to the argument that punishment is implied by law-breaking and is therefore only a definitional point.

Mabbott argued:

"A criminal means a man who has broken the law, not a bad man; an 'innocent' man is a man who has not broken the law in connection with which he is being punished, though he may have broken other laws." (J. D. Mabbott, 'Punishment', reprinted in Acton (Op.Cit., p. 41); and, that there is a connection " ... between punishment and crime, not between punishment and moral or social wrong." (Ibid., p. 42).

However, Mabbott was not clear himself as to what he meant by 'punishment'. Presumably he means to exclude all talk of punishment in schools, in clubs, in the family, in games, of children, of animals, and so on from the discussion. Yet he uses the students in a college where he was disciplinary officer as an analogy comparing that to the relationship of judges to criminals. Either he is mistaken in choosing to limit punishment to crime (in which case he should have chosen a better example) or he would be using 'crime' to mean any breach of rules regardless of whether or not it was also a law. Mabbott does not consider 'punishment' in any other than the rather narrow use of the word. Although I am primarily interested in legal punishment myself, it seems obvious to me that to search for a purely legal definition of the word is to possibly miss out on some of the more basic and relevant points involved in the concept.

in the next chapter, but what should be noted here is that the connection between 'offender', 'offence', and 'rule' (or 'law') is very close. In fact, within the concept of 'rule' exists the possibility of there being an offender for it. But that does not mean that if a rule is broken and the offender identified that punishment must necessarily follow.

(D) The Fourth and Fifth Criteria.

As most of the philosophers mentioned so far have been interested primarily in legal punishment as a distinct concept from punishment (say) of a child by his parents, either actual or surrogate, this criterion (it must be the work of personal agencies) and the next one (it has to be imposed by some special authority) serve the purpose of limiting the definition by excluding non-legal uses of the word. All other uses are " ... relegated to the realm of the 'sub-standard'"[23] thus self-punishment, punishment by fate, etc., are out of the discussion. I think that Hart at least is too limiting with his definition. Flew and Benn do not discuss punishment in other than a legal context except in passing. Punishment in school situations and punishment in the home are (at least these two) not sub-standard usages of the word. Also punishment

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[23] McPherson, Op.Cit., p. 22.

of animals does not seem out of the ordinary usages. If the emphasis on legality were relaxed these would be admissable examples, and probably constructive ones.

The whole concept of authority is an interesting one and is crucial to the definition. The payment of fines imposed by one's golf club for non payment of dues must be considered a form of punishment within the jurisdiction of the club. Since the person (offender) subscribes to the rules of the club he is eligible to be punished for contravention of one of its rules. The authority of the club would not, of course, be able to extend outside of the boundaries of the club's constitution (speeding on the Queen's Highway, for example) but would be in force within the areas of the club's jurisdiction.

The definition of 'punishment' then has five elements in it. More simply stated we can say that 'punishment' is the infliction of a penalty on an offender for an offence by a person in authority. We can add that it is to be understood that the 'authority' must be able to claim jurisdiction over the particular offence in question and that the 'offender' must be a subscriber to (have knowledge of) the set of rules within which the offence occurred.

Flew[24] says "A parent, a dean of a college, a court of law, even perhaps an umpire or a referee, acting as such, can be said to impose a punishment: but direct action by an aggrieved person with no pretensions to special authority is not properly called punishment, but revenge." Benn and Hart have been most concerned in their discussions with legal punishment. Perhaps they have felt it necessary to do so because they thought it easier to separate out the relevant issues. Flew specifically includes any set of rules[25] as a proper vehicle for the establishment of the right to punish. Hart, writing after Flew, specifically excludes the possibility of discussion of non-legal punishment.[26] Flew is right here. The restriction of the discussion to legal punishment brings us back much closer to Mabbott's old and too narrow position that punishment and crime are very closely related terms. It may be easier to defend the technical-legal definition than the one based more in ordinary language, but the latter definition is much closer to the situation at hand - what do we mean when we use 'punishment'?

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[24] Flew, Op.Cit., p. 87.

[25] Ibid., p. 87.

[26] Hart, Op.Cit., p. 5.

V. OTHER CONSIDERATIONS REGARDING 'PUNISHMENT'

There are some points that should be made that, although they are removed from the central discussion of the Flew-Benn-Hart definition, are nonetheless points relevant to an understanding of the usages of the term.

(A) Punishment has relational qualities.

'Punishment' is an historic-relational term. That is, there is a necessary relationship between the present punishment and an historic offence. Although this point does not have too much relevance to the discussion at hand, it will have considerable weight when we shall be discussing the justification of punishment. And since the justification must necessarily relate to the meaning or definition, this fact should be noted within this discussion. The term also is relational in the sense that "it takes two to make a punishment"[27] in the 'core' usage of the word.

If it takes two to make a punishment one might be led to conclude that 'self-punishment' would be outside of the core usage. If it were outside the core usage a sentence like "John has been punishing himself because

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[27] Mabbott, (Op.Cit., p. 41).

he left the car lights on and ran the battery dead" would be using 'punishment' in a metaphorical or secondary usage way. However, both the punisher and the punished are easily identifiable (it just happens that they are the same person) and an historic relationship is implicit in the statement. Further John, because he is a moral agent, has the authority to impose a sentence upon himself for his breaking of his own rule. All the necessary elements are present to establish self-punishment as a valid use of the label 'punishment' in the core meaning of the word.

(B) Punishment implies a responsibility on the part of the offender.

Quinton[28] points out that the difference between incarceration and hospitalization is that in the first case the individual is said, or at least thought to have, the responsibility and the associated guilt of the act for which he is being punished. A person under hospitalization has no blame attached to his being there.

Along with the concept of punishment, then, must be the understanding that the person being punished is being blamed for his action. Blaming cannot be done without drawing in the concepts of rules and their contravention. Although a person living in army barracks

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[28] Quinton, (Op.Cit., p. 59).

may be living under more hardship than persons in modern day prisons, he cannot be said to be under punishment (for an offence) since there is no blame attached to his service because no rule was broken which resulted in his enlistment.

The implication of 'blame' in connection with 'punishment' can be brought into question when an offence is committed that is contrary to a legal rule but not contrary to some people's moral rules. Consider the case of the conscientious objectors, for example. A judge faced by such a person might well say "Although I do not blame you for either your beliefs or for living by them, I do blame you for contravening a legal rule, namely, the order to enlist in the armed forces, and am therefore sentencing you to incarceration (punishment)". 'Blame' need not be restricted to only moral situations even though it is normally considered to be a word restricted to discussions of morality.

VI. APPLICABILITY OF THE FLEW-BENN-HART DEFINITION

We have seen how the approach to definition of 'punishment' has been changed by Benn and again by Hart from Flew's original position. The change has shifted the discussion from the wider normal usage to an area

of specialized usage which restricts the meaning to apply only to legal punishment. In ordinary language, of course, we use 'punishment' in the wider meaning. I will argue that this wider meaning is more useful and that in fact to restrict the meaning allows for oversights to be made in usage since one would usually not know if the normal or the restricted usage was being meant in the discussion.

Although ordinary language cannot be taken as the final authority of considered philosophy there is a danger in not using ordinary language usage as much as possible, since it is with ordinary language that we normally communicate. Only when it becomes clear that the usual usage is inadequate or very ambiguous and that by a re-definition of the concept some of the conceptual problems will be solved should a departure be made from that ordinary usage. In the discussion of the definition of punishment there is little doubt that there are conceptual problems. The usual usage of the term leaves us with a very 'open-textured' meaning. Certainly within the practical realm there is no concensus on the meaning of 'punishment'. In fact, the various proponents of any particular position are seldom in complete agreement with each other. Yet there is no easy path to clearing up that dilemma by the

technique of re-definition of the term. Using the divisions of usage outlined by McCloskey[29] and comparing the above definition we can see some of the key points of the definition.

The central mistake in McCloskey's paper is indicated by his title. Instead of saying " ... the Concepts of Punishment" he should have said " ... the Contexts of Punishment". There is one concept of punishment, and that concept can be applied to a variety of contexts. Although, as we shall see, this is not his only confusion, McCloskey's paper is a good arena in which to illustrate some very important points.

McCloskey's main point is meant to argue that "punishment" is misused in contexts other than the legal sense. I will not deal with all of his contexts (what he calls "concepts") but rather look at only those that would seem to be most open to criticism (divine punishment, punishment of moral offenses qua moral offenses, and punishment in education) and ignore the others (punishment in family situations, games, voluntary organizations, etc.) on the ground that if 'punishment' is found to adequately describe what is usually called 'punishment' in the more vulnerable contexts it will surely apply in the more standard usages.

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[29] H. J. McCloskey, 'The Complexity of the Concepts of Punishment', Philosophy - The Journal of the Royal Institute of Philosophy, Vol. XXXVII, Oct. 1962, pp. 307-325.

(A) Divine punishment.

In his discussion of divine punishment McCloskey's main points are: that God's "authority (to punish) does not spring from any institutional arrangement, or any set of rules;" " ... (an offence) is not necessarily a breach of a determinate rule;" since divine punishment is usually reserved until after death on earth it is really a "deferred punishment;" " ... (guilt) is not determined after formal procedures have been followed."[30]

If there is a God, and for the purposes of this discussion we will assume that there is, the question of how He arrived in the position of authority is hardly open to question. Under the Theist view of God, it is assumed that He is the supreme authority without question. So His authority to punish is established.

Even God should be able to say what a person was punished for. The fact that it is for an offence means that the offence should be known. If the offence is not known, as we have observed above, the penalty inflicted cannot properly be called a 'punishment'. The fact that He is angry does not constitute a punishment, but rather constitutes revenge (I am a vengeful God). The fact that Theists speak of punishments imposed upon whole societies would indicate that some

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[30] Ibid., all quotations taken from p. 309.

innocent persons suffered as a result. They certainly did not know what they were being punished for, and they should not have been subject to punishment if they committed no offence. Usually, however, some breach of moral rule is the 'offence' in discussions of divine punishment.

The concept of deferred punishment posed no problem either to the proposed definition or to the normal practice of punishment. Many instances of punishment as practiced are for offences committed quite some time ago. There is nothing in the definition that would suggest a time limit on the liability of punishment for an offence.

Similarly with the criticism that no " ... formal procedures have been followed." McCloskey seems to confuse the concept of institutionalized legal punishment with the definition of punishment as proposed by Flew et al. True, elaborate precautions are taken to see that the due process of the law is not thwarted in legal punishment, but that fact has nothing to do with the definition of 'punishment'. The due process is an attempt to protect the individual's rights even in the face of liability of punishment. The offender may be found guilty, but that fact does not detract from his rights as a member of the society. Formal procedures

are not a part of the definition of punishment, they are a part of the 'social contract' between the individuals of a society and the authority of that same society. Since formal procedures are not to be construed as part of legal punishment there is no reason to assume that they should be part of divine punishment.

In the main, the definition of punishment will adequately express the understanding of 'divine punishment'. The concepts of 'offender' and 'offence' are somewhat extended from their more normal usages. Many times the offence may not be known, and often the offender would be innocent (as in collective punishments). The infliction of the penalty itself may not be regarded as a punishment for an offence until long after the 'punishment' is passed and the offender has reflected on his state of affairs. There would probably be little opportunity for defense in God's court.

The problem of squaring the definition of punishment with divine punishments is not whether 'punishment' is used correctly as it is whether 'offender' and 'offence' are used correctly. Providing there is an 'offender' and an 'offence' there is no worry about "punishment" being sub-standard usage in the context of divine punishment.

(B) Moral offences qua moral offences.

McCloskey's case against moral offences is, in my opinion, the weakest of his arguments against there being a core usage of 'punishment'. Let us look at his main points: "There is no such thing as punishment of a moral offence qua moral offence"; " ... all moral punishment is also punishment of some other kind - either divine or legal", " ... neither blame nor social censure is punishment. ... it is neither morally proper, nor indeed logically possible for me to punish (a person for a moral offence)"; " ... there is no proper authority, or that we are not proper authorities, entitled to punish moral offences qua moral offences"; " ... social censure ... is too indeterminate and capricious a thing to qualify as an institution of moral punishment."[31]

Few people would say that lying is not a moral offence. In any case, if an employer fired a man for lying to him, no one would say that this was not a punishment. Also it is a punishment for a moral offence, despite the fact that there is no written law that says you should not lie to your employer. There are so many examples of moral offences resulting in punishments that are understood by every observer, including the

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[31] Ibid., all quotes taken from pp. 309-310.

offender and the "authority", to be just that - punishment - that it is difficult to see how McCloskey could say that there is no such thing as a moral offence qua moral offence and continue on to say that all moral punishment is also either divine or legal punishment. It may be McCloskey's opinion that it is not morally proper for an employer to fire an employee for a moral transgression (even as small a thing as showing disrespect) but it certainly is possible - not only logically, but in fact, possible. Also he may think that we are not proper authorities to punish for moral offences but it happens every day. If, however, the punishment is such that it falls within the area of our code of laws the offender is liable to punishment under the authority of the courts. Such a thing as assault or defamation of character could have been the result of a person attempting to punish someone else for a moral offence but went beyond what is acceptable punishment for moral offences qua moral offences. By so 'stepping over the line' the self-appointed punisher leaves himself open to face charges in a court of law. It is not the case that we are not the proper authority to punish for moral offences, but rather that we can only issue punishments up to what is permitted by custom or law for a moral offence. Anything over that must be handled by the proper authority for that sort of offence.

With his final point McCloskey is making the error of assuming that there needs to be an institution handling all the offences that could be called moral offences. Of course there is no such institution, but neither is one needed from the definition since we all operate under the assumption that as long as the punishments fall outside the boundaries set out by law we can in appropriate situations (e.g., parent, teacher, etc.) assume the position of authority.

Moral offences qua moral offences do exist then. Punishments are handed out for those offences by those persons who are accorded the authority to punish. 'Morality' is more 'open-textured' than 'punishment'. But that does not mean that it is either non-existant or meaningless. Much of morality is not codified nor institutionalized. It is in these areas that moral offences exist in their own right. It is interesting, however, that the concept of authority is somewhat removed from the normal usage in areas where it is more natural to say that someone was punished (within the home, school, or an association or club). In those cases 'authority' is established either by virtue of mutual agreement, law or history. In the case of moral offences outside of those areas the 'authority' is a little more suspect. However, as I argued, authority is

assumed daily by persons who think they have been the object of a moral transgression, but that does not take away from the observation that authority is not established with the same firmness that it is in the other instances of usage.

A word about the confusion McCloskey makes about 'blame', 'social censure', and 'punishment'. He may be right when he says that "neither blame nor social censure is punishment",[32] although what he means is that neither blame nor social censure is, in itself, an appropriate method of inflicting a legal punishment. The employer need not have fired the liar. He could simply have publicly blamed him for the action. That may have been sufficient punishment for the offence in the employer's eyes. That action is both an act of blaming and social censure, as well as an act of punishment. The problem here is that 'blame' can function as both the requisite condition of punishment and the punishment itself. Social censure can be a mild form of punishment. If the censure is 'for an offence' then it would be regarded as a punishment. If the censure is not 'for an offence' (if the object of the censure is handicapped and is berated for that by unthinking persons, say) it could not be regarded as a punishment.

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[32] Ibid.

(C) Punishment in education.

Let us look at what he has said: "Educative punishment seems not to imply the commission of an offence ... "; " ... collective punishments are often necessary and the only form possible ... (and) the offence cannot always be announced and indicated in advance"; "Punishment (in education) seems not to imply an offence in another sense, namely, that the offending act be voluntary, e.g., in punishing the effects on character of bad homes, thoughtlessness, stupidity, clumsiness, or natural defects which punishment will help to bring under control."[33]

Most of McCloskey's comments about education and punishment have to do with the concept of an offence. I take him to mean by 'offence' the breaking of some rule, issued by some institutional authority, preferably legal (although rules of association for voluntary organizations would be acceptable to him) and preferably written down for all to see. In McCloskey's opinion, it would not seem to be enough that the teacher say "Do not talk during the examination period" to constitute a rule of sufficient stature that the breaking of it would constitute an offence, and make the 'offender' liable for punishment. There is no doubt

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[33] Ibid., all quotations are from p. 312.

that the sorts of rules found within the school structure are not, and will not be legislated by government. However, the rules exist, students are punished for these offences - both individually and collectively - frequently. These actions are punishments, and everyone involved in the action from the provincial educational authority through to the parents of the 'offender' views the action as a punishment. The key is that since the offence is a minor offence, the punishment is a minor punishment. We are not considering at this time whether the punishments are just, or excessive, but whether they are punishments or not - and these are seen as punishments.

There are exceptions, or actions thought to be punishments, which upon analysis probably are not punishments. For example, the instance used by McCloskey when he says that "the offence cannot always be announced in advance" is a case in point. Presumably, if the situation were discussed with the teacher, the point would be granted that in that particular case 'punishment' should not be the name applied to the action. The psychologist may call it 'negative reinforcement' or some other term acknowledging that since there was no knowledge on the part of the offender we cannot legitimately call his action 'an offence' and

therefore cannot call the action on the part of the authority a 'punishment'.

Nor would anyone argue that involuntary actions are never punished - that instances arise where there was a punishment-like action but the offender did not act voluntarily. Nor would we say that no thoughtless teacher ever 'punished' a person for circumstances he could not possibly be responsible for. But, these admissions do support the argument that therefore there are no legitimate punishments within the educational sphere. This is exactly what McCloskey is saying when he says "Educative punishments seem not to involve the commission of an offence." If there is no offence committed there can be no offender. And if there is no offender how can one call the actions we have been discussing 'punishments'? No, there are offences, offenders, and punishments within the educational activity.

We use a lot of words to describe punishments: spanking, detention (both in educational and legal realms), fines, and so on. Because the set of examples that can be included within the set of 'punishment' is large and is comprised of many sub-sets described by other words, and also because these sub-sets can

stand in the same relationship to further sub-sets, we have to be very careful that we do not attempt to draw distinctions between these sets as being entirely separate and distinct. What makes a 'fine' different from 'incarceration' is the severity of the action only, (i.e., that with one the offender pays money, with the other he goes to jail), not some fundamental point of philosophy of morals or linguistics. The same offence can easily result in a wide variety of sentences. The fact that this is true does not allow us to call one an instance of 'punishment' and the other not. The operant question here is what sort of punishment is it? The words that are logically proper as an answer are: just, harsh, easy, unjust, deserved, and other evaluative adjectives.

The whole thrust of the first part of McCloskey's paper is that 'real' punishment does not occur in any of the above areas save legal punishment (and even that is questioned) in a strict sense. Sure, the word is used, but in metaphorical and parasitic ways. I would agree that we normally think of punishment as being somehow different as we move from one area of usage to another. Let us look at how this difference is to be understood. The key concepts that need to be evaluated when we talk of 'punishment' are 'offence', 'offender', and 'authority'.

Once we understand the nature of 'offence', then 'offender' is understood as well, An offender is a person who has committed an offence. So the key to the problem must lay within the concept of 'offence'.

Within a legal context 'offence' has a precise meaning. If the particular action is not covered by a legislated rule written into the Criminal Code it simply is not an 'offence'. In no other area of discussion is the meaning of the term so restricted and precise. We use the word in ordinary language discussion but somehow tend to regard the legal sense as the meaning of the word. Philosophers do this as well. It seems better to consider that the normal usage is adequate.

There are then at least three distinct senses where 'offence' is used: first, in a legal sense where the legislature has defined the nature of the action and a successful argument on the part of the Queen or the Prosecution is required before the action can be properly called an 'offence'; second, in the sense where rules are either written down (by other than the legislative authority) or are achieved by consensus, but are nonetheless articulated by the persons who are going to subscribe to the obeying of that particular rule; and third, those rules that exist within our

society (or any other) that each person must decide upon for himself. These last are not codified in any organized manner, no institutional arrangements have spawned them, and they may vary from man to man.

The same distinctions apply to the concept of 'authority'. There are at least three distinct and separate uses of the term; first, institutionalized and the legislated; second, institutionalized but not legislated; and, neither institutionalized nor legislated. Examples of authority in each of these cases can easily be shown. A court of law (the normal instance of a legislated and legal authority) and the army would be examples of institutionalized and legal authority.

The second case would include the examples of educational authority, voluntary organizations, and probably the family (although this last would derive its authority from historical considerations, it is not very difficult to consider the family as an institution in this society).

Within the third category we would find such things as businesses or personal relationships. Authority in this sense is neither the result of some legislation structuring the moral codes that would be operating in a certain setting nor is it the result of some formalized arrangement between the parties.

Each of these logically separate areas will have its examples of 'offences', 'offenders', and 'authorities'. And therefore each of them will also have its examples of 'punishments'. The question we are really asking is "When is it logically proper to apply the label 'punishment' to particular actions within each of these possible categories"? As an answer we would have to say "when all the conditions needed to identify the action and fill the definition are satisfied". If there is a penalty to be imposed (regardless of whether that penalty is seen as offensive, although normally it would be), an offence committed (real or at least supposed since if the offence is neither a real offence or a supposed one, the resultant 'punishment' would be the pretense of punishment and therefore a lie), an offender (real or supposed because anything else would be revenge or victimization), and an authority (able to exercise power over the situation in question because if the authority were not 'in command' of the particular offence he would be acting outside of his 'jurisdiction' and would be participating in revenge or victimization) then and only then is it correct to call the action a 'punishment'.

In my opinion we would possibly be missing some important points if we were to restrict either 'offence'

or 'authority' to the legal and institutionalized usage even for strict legal or philosophical considerations. By so doing we would be limiting discussions of 'punishment' to those categories only and leaving the sorts of confusion we now have ruling the day. It is much better to recognize the possible senses in which these words can be used and if a particular case arises where the restricted usage is needed, then it can easily be specified. McCloskey is a good example of what happens when this approach is not taken. What he is doing is arguing across senses using these words. If he were to say that he takes 'offence' to mean the breaking of only those rules that have been institutionalized and legislated we could easily see that 'punishment' in that sense of the usage would not apply to educational, home, or divine situations where we would normally consider the action a 'punishment'. Then there would be no ambiguity except perhaps within the context he is discussing itself. However, without specifying this restriction of usage, it seems as though he is talking about 'punishment' in the wider sense of the word. Obviously if one person were to take 'offence' to mean 'breaking of any rule or pseudo-rule' while a second person thought it meant 'the breaking of only those rules that have been

institutionalized and legislated' there would be little opportunity either for useful analysis of the meaning of 'punishment', or for furthering our understanding of the moral discussions surrounding the justification of the practice of punishment.

The same sort of understanding must be arrived at with 'authority' as well. These two concepts, of all the criterion of the definition, must be agreed upon before any worthwhile dialogue can go on regarding philosophy of punishment.

VII. SUMMARY

In this chapter we have been trying to establish rules to help us to decide if 'punishment' is the appropriate description of a particular event or not. Initially the distinction between the activity of the dictionary-maker and the philosopher was discussed. The philosopher, we said, was looking for resolution of different positions or for clarification of ambiguities while the dictionary-maker was more concerned with listing the usages regardless of ambiguities. The philosopher did this essentially by seeing the extent to which ordinary language applied to the situation and not departing from that usage unless clarification of the concept resulted in meaningful ways.

Also he was very concerned with establishing the rules surrounding the usage of the terms under his scrutiny.

Since activities are definitional in nature, we next looked at the various types of definitional activity so that whatever resulted from our inquiry would be seen within the appropriate context. What we have been concerned with in this chapter was moving the discussion from the level of 'pseudo-definition' where what we have is a 'verbal bridge' between theory and observation towards an 'explicit definition' where all the parameters of the concept in question are identified and defined. Certain limitations to our goal had to be noted. In particular, the fact that the definition of 'punishment' and the justification of the activity of punishment cannot be completely separated. Nevertheless we proceeded as though they were separable because it allowed us to focus more closely on the parameters of the concept.

Next we listed and discussed the parameters of the 'Flew-Benn-Hart' definition of 'punishment'. By analyzing the definition criterion by criterion we were able to see how the definition changed from writer to writer over time. Some of the points noted were: (a) that the application of the label 'punishment' could be brought into question if knowledge of the

rule could be shown to have not been at all possible by the 'offender'. This would have the effect of removing the responsibility and the intention to break the rule from the action in question and so make the label inappropriate. (b) that logically, 'punishment' cannot be applied to the infliction of a penalty on the innocent. We would call this 'victimization' when it occurred. And, (c) we rejected the point that punishment must be tied to rule-breaking in the legal sense. The restriction imposed by this concept may reduce the discussion to the level of tautology and end up going nowhere.

In addition, we observed that 'punishment' has two relational aspects. It implies two identifiable parties (the punisher and the punished) and it has an historical element. Further, responsibility and blame are to be necessarily connected with punishment.

Having looked into the various parts of the definition we moved on to see how that definition applied to some of the areas of normal usage of 'punishment'. The recurring themes of that discussion centered around the establishing of and meaning of 'authority', the various contexts of 'offence' and 'offender', and the way 'punishment' was to be understood within these areas. We saw some discussion of moral offences qua

moral offences and the position was argued (against McCloskey) that moral offences as such not only exist but are extremely common. We also saw that many words can be used to describe actions that are technically punishments, 'penalty' 'disqualification', and 'blame' being some. Further we noted the dangers of arguing 'across senses' when using the concepts noted above.

What should be said then, in the end, about a concept like 'a core usage of punishment'? Most of the published discussion on this topic is concerned with deciding what that core usage is. That is, they are trying to decide whether the term should only be applied to legal usages, whether it should include other 'institutionalized' usages, or whether it is to remain 'open-textured'.

We observed that within each of the areas of standard usage examples could be structured that would strain the conditions of the definition to the point that we could no longer call the action a 'punishment'. There seems to be no possible solution to the question of core usage of the term when it is approached from the position that either one or more of the standard areas must be the archetypical example from which all other contexts can be said to derive their meaning. There is a core meaning, and that meaning is the description of the

situation when there is a penalty being inflicted, on an offender, for an offence, by a person in authority. It matters not whether that situation arise in games, dog training, or a court of law. Counter examples from any of the areas of usage can come up, but they will be seem to be lacking in at least one of the criterion of the definition. Most usually they will not have an 'offence' or an 'offender'. Occasionally the 'authority' will be questionable, or someone will be pretending to have authority which he in fact does not have. When the penalty itself is questioned the justness of the action is at issue. Providing the criteria are met we would want to call the action a 'punishment', but it might be an unduly easy or harsh punishment. It might be called 'unjust' because of the harshness but it still is a 'punishment'.

Whether or not we apply the label 'punishment' to a particular action, then, is to be decided by an analysis of these criteria. If they are all met adequately there is no question that the action can properly be described as a 'punishment'. If they are not then it must be decided whether the various criteria are stretched beyond credibility. If they are then 'punishment' is not the appropriate term.

CHAPTER III

JUSTIFICATION OF PUNISHMENT: RETRIBUTIVE AND UTILITARIAN

The word "punishment" has negative connotations in ordinary language usage. For a person in response to the question of how he enjoyed a recent trip to the country to answer by saying that "it was punishment," the message would be conveyed that it was not at all pleasant. When a whole system of law, detection of offenders, prosecution of those detected, with institutions to receive those unfortunate individuals, is set up, it is not surprising that there is a feeling that a philosophically sound justification for the expense in terms of people and national wealth must be sought. And the expense is tremendous. Figures in the order of $15,000 per inmate per year for incarceration alone are not unrealistic. It is no wonder that many concerned persons are seriously questioning the relevancy of the whole approach being taken by government agencies to punishment as a means of social control. In this chapter, the main concern will be with the complex tangle of issues involved in the justification of punishment.

Quoting S. I. Benn, "Thus the problem of justifying punishment arises only because it is not completely effective; if it were, there would be no suffering to justify."[1]

In the chapter on definition of "punishment," we found that there was a core meaning of the word. Also, "punishment" could be used correctly in a variety of contexts. These contexts reflected institutionalized and legislated rules, institutionalized but not legislated rules, and rules that were neither institutionalized nor legislated. In this chapter, focusing as it does on the justification of the practice of punishment, the main concern will be with punishment in the legal sense. To be concerned with punishment as it is applied in the home, games, or the school, not to mention private interpersonal instances of punishment, will be more or less outside the scope of this chapter. Thus, while we must not lose sight of the fact that "punishment" is used in all these situations, the results and findings of this investigation may not directly apply to other than legal punishment. In normal day-to-day life, we are not likely to question the fact that someone punished his dog, or whether a

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[1] S. I. Benn, "An Approach to the Problem of Punishment," Philosophy, Vol. XXXIII, No. 127, October 1958, p. 330.

child in school is punished, but many of our citizens are concerned with whether we punish certain criminal offenders, and also how much punishment each individual offender receives. The discussion then will be meant to apply directly to legal punishment and its justification.

The question being asked in this chapter is "How is punishment, as a process, to be justified, if at all?", not "What is the justification of a specific punishment?" The sort of answer we will be looking for will be more concerned with directions that will need to be taken when formulating a theory of justification for punishment as such. The second question, namely, what is the justification for a specific punishment, will be a much easier question after we are clear about the claims that have to be satisfied by any justification for punishment as such and about the process of justification itself.

Philosophy has traditionally looked at its problems as either/or situations. The problem of the justification of punishment is no departure from that tradition. Is punishment to be justified on a basis of retribution, or is it to be justified from utilitarian ethics? Are we to view the criminal as being an agent of free will, or are we to view him as a

product of his environment and thus the product of the determinist position? These are the central questions in the literature. These are the issues that have prompted the writings. These are the results of the public confusion and the lack of consensus among the considered positions taken about the question of justification of punishment in general. The wedge of dichotomy has been driven so deeply that, although many of the answers have been before the philosophical public for years, the discussions have not diminished.

To ask about the justification of the practice of punishment is to take the theories most prevalent in the literature and pit them one against the other and choose one, finally, as the best. This is exactly what has been done in most of the writing on the subject, but the results are not conclusive. Neither of the two main approaches has won very much.

The main theories of justification of punishment are the retributive theory and the utilitarian theory. Utilitarians seem to have taken three separate courses: those of "deterrence", "reform", "rehabilitation" and "social protection". Of these three, deterrence is considered to be the most important and therefore is the most popular.

As an overview, it is useful now to state, in a very simplified way, each of these positions and their different versions:

1. RETRIBUTION: This theory holds that a person is punished because he committed either a moral or social wrong. Because he broke the law, he deserves to be punished.

2. UTILITARIANISM
   (a) DETERRENCE: This version holds that we must punish persons to discourage others who might commit that same offence from doing so.

   (b) REFORM: This version emphasises that once the man has been identified as culpable, he is sent to an institution so he can benefit from the training given there and ultimately emerge a reformed man. The justification for the punishment, then, is to put the person in a position where reformers can get to him easily.

   (c) PROTECTION OF SOCIETY: This version of utilitarianism believes that persons who break the law are a threat to society. It is necessary to "put them away" for a period of time so that society is not threatened by them.

Much of the ongoing discussion of whether one is ultimately to decide if punishment is to be justified from the retributivist's armory or the utilitarian's camp feeds on the murky waters resulting from not being very clear about which of a group of questions are being answered.

Mundle says that: "The controversial question is whether the fact that a person has committed a moral offence constitutes a sufficient reason for inflicting pain on him."[2] There is a difference between the

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[2] C. W. K. Mundle, "Punishment and Desert," in H. B. Acton, The Philosophy of Punishment (Macmillan and Co. Ltd, 1969), p. 69.

question "what is the justification for punishment?" and "was the punishment, whatever it was, just?" Or, stated in another way: it is a much different thing to ask "why is this man being punished?" than it is to ask "why do we punish people at all?" Rawls[3] in his 1955 paper pointed this distinction out clearly, and S. I. Benn[4] pursued that topic further. It is an important point, and it is surprising that the accumulation of point and counterpoint has not yet been adequately resolved. While Rawls and Benn do not go far enough, they are surely pointed in the right direction.

II. OVERVIEW OF CHAPTER

First, we will look at the two basic positions, Retribution and Utilitarianism, noting the strengths and weaknesses of each position. Of the issues in the literature, there are a number that are important to state at this time, while some are really not important. If we are to take retribution seriously, we need to be sure we are not discussing a purely definitional point. An investigation into whether or not retribution is a moral doctrine will be made. The next point of interest is the view each of the positions

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[3] John Rawls, "Two Concepts of Rules," (originally published in Philosophical Review, January 1955) Quotes for this paper taken from Philippa Foot, Theories of Ethics (Oxford University Press, 1970), p. 144-170.

[4] S. I. Benn, Op.Cit.

takes regarding the offender. Most of us regard ourselves as important entities in the social structure. This attitude is what is at the heart of this important issue. Some of the assumptions behind the various theories are brought out by looking at the question of how the theories regard the offender. A section contrasting and comparing the two positions may however leave us, because of the inability satisfactorily to account for all the aspects of punishment, unable to pick "the best" justification of punishment.

III. THE CONTROVERSY: TWO POSITIONS

> In fact (Hell) may be described as the archetypal instance of retributive punishment, for eternal damnation cannot be regarded as having any reformative function, and the degree of punishment usually said to be inflicted in Hell seems sufficient deterrence without the addition of eternity...The damned in Hell were there because they deserved it, and were not worthy of pity.[5]

Retribution is criticized as being harsh, cruel, and vindictive. Reform and deterrence are criticized because they would, as Mabbott[6] said, "justify punishing persons generally not thought guilty." Mundle

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[5] Professor Flew quoting A. R. Manzer. Professor Flew in H. B. Acton, Philosophy of Punishment, p. 104; A. R. Manzer in "It serves you Right," Philosophy, 1962, p. 297.

[6] J. D. Mabbott, "Punishment (1939)" in H. B. Acton, The Philosophyof Punishment, p. 39.

asks, "The controversial question is whether the fact that a person has committed a moral offence constitutes a sufficient reason for inflicting pain on him."[7] Retributionists say that the reason you punish a person is because he broke a particular law or rule. Utilitarians would argue that the man is punished because he will serve as an example to others who might commit the crime (or that he can then be reformed by the prison system, etc.) and that this provides the justification for the punishment, not simply that he broke the law. They say further that to punish simply because he broke the law is a definitional point only. John Rawls has pointed out that in practice it would be very difficult to have an institution of punishment that would decide that a particular innocent person should be punished ("telished"), challenging that argument against retributivism.[8] Point and counterpoint accumulate. One feels as the literature is read that both the retributionists and the utilitarians are right. Both describe correctly the process of punishment; but neither is completely right, yet neither is wrong. How, if at all, are we to reconcile these two views?

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[7] C. W. K. Mundle, Op.Cit., p. 69.

[8] John Rawls, Op.Cit., p. 151.

Logically and philosophically the retributive position is appealing. Strong points can be made, supported by definitions and common sense. The utilitarian position, on the other hand, appeals very strongly to one's social conscience and faith in humanity. We want to think that what we are doing when we punish someone is for the greatest good, that the offender is being helped, and society is being fostered. These basically utilitarian feelings cannot be overlooked, and yet the simple fact is that we do say that we punish people because they broke laws.

This controversy is not new. Beccaria stated the retributionist position two hundred years ago. Bentham and Mill, both contemporaries, did their work in the early 1800's, founding the school of Utilitarian Ethics. Their original statements have undergone change and modification over time, but the essentially different positions still remain, challenging each other in the journals of today. Briefly then, let us turn now to look at each of these positions.

(A) Retribution.

> Retribution, as Beccaria (1738-1794) said two hundred years ago, involves an effort 'to make the punishment as analogous as

> possible to the nature of the crime.' To modernize the definition: retribution creates a proportionate relationship between offense and punishment.[9]

Dr. Middendorf goes on to say that

> The modern idea of retribution is not, however, that of 'lex talionis'; the emphasis is placed today on the degree of moral guilt of the offender. 'As a man sows, so shall he reap.'"[10]

These statements are typical of the retributivist position. The main points of the position are:

--Only those persons who have committed an offense are liable to punishment, and the fact that they have done so is sufficient reason to punish. Some writers would have us associate the offense with moral guilt,[11] others would restrict the term to mean only legal offenses.[12]

--A second point of the position is that there is to be some correspondence between the act committed and the amount of punishment deserved. This point stems from the old legal law of "Lex Talionis,"

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[9] Wolf Middendorf, writing in one of a collection of untitled papers in Punishment: For and Against (Hart Publishing Company, Inc., New York, New York, 1971), p. 12.

[10] Ibid., p. 13.

[11] C. W. K. Mundle, Op.Cit., p. 69.

[12] J. D. Mabbott, Op.Cit., p. 41, "It will be observed that I have been treating punishment as a purely legal matter. A 'criminal' means a man who has broken a law, not a bad man..."

"the law of retaliation" (Webster), commonly understood by such phrases as "an eye for an eye and a tooth for a tooth." Such a strict relationship between the offense and the punishment as suggested by "lex talionis" is not possible, of course, but some effort is made to graduate the amount of punishment in accordance with the seriousness of the crime.

--Associated with the above is the general feeling that the criminal himself is a person sane enough to have been responsible for his act and so deserves to be treated as though he were responsible and not sick. He is deserving of having a non-medical penalty inflicted upon him, rather than being set to a hospital for psychiatric or other treatment. Mabbott points this out in his 1939 article, and although he was criticized for considering the criminal's (see Glover[13]) position, he is surely right in doing so.

The main points of retribution, then, are that the punishment is imposed because the person broke the law. If sentences vary from instance to instance, it is because of varying amounts of criminal desert involved in that particular act. The more criminal desert, the more punishment warranted. Retribution

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[13] M. R. Glover, "Mr. Mabbott on Punishment," Mind, October 1939.

must be backward looking rather than forward looking. That is to say that the main concern is with the history of the particular crime in question, not with the possible deterrent effects or the probable rehabilitative effects of the punishment.

If one continues on, following the arguments in the literature, the next question is "How can the retributivist account for the laws themselves." In order to justify the existence of the laws that are upheld by the judges, it seems that the retributionist must support an intuitional approach to ethics rather than a utilitarian one. It is argued that if any utilitarian considerations are granted, in the final analysis the retributionist is going to have to concede the argument to the utilitarians. For example, if one holds that we have laws in order to preserve society, either by protecting the individuals from criminals or because crime itself cannot be tolerated and punishment will have a strong deterrent effect, then he is holding a basically utilitarian position, regardless of whether or not he says that in this particular case the man was punished because he broke the law, and even that he received such and such a punishment because of his criminal desert at the time of the crime. The fact that ultimately he is resorting

to utilitarian arguments means that he is holding a utilitarian position, it is argued.[14] So we have to conclude that the retributivist is a subscriber to some non-utilitarian approach to ethics in general, if we follow the argument from the literature.

(B) Utilitarianism.

The main difference between the retributivist position and the utilitarian position is the direction of focus the theory takes regarding the justification of punishment. While the retributivist is "back-ward looking," as we have seen, the utilitarian is "forward looking". The main justification must be found in the events following the crime and subsequent punishment rather than an evaluation of the criminal desert at the time of the crime, it is argued.

> What we may call the utilitarian view holds that on the principle that byegones are byegones and that only future consequences are material to present decisions, punishment is justifiable only by reference to the probable consequences of maintaining it as one of the devices of the social order. Wrongs committed in the past are, as such, not relevant considerations for deciding what to do. If punishment can be shown to promote effectively the interest of society it is justifiable, otherwise it is not.[15]

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[14] S. I. Benn makes this point. See Benn, Op.Cit., p. 328.

[15] John Rawls, Op.Cit., p. 146.

There are many possible sub-headings for utilitarianism: "deterrence", "reform", "rehabilitation", and "social protection", to name the more important ones. Each of these concepts and the theoretical formulations will have its own arguments supporting the utilitarian position. The main deterrent argument is that punishment is imposed because the threat of punishment will deter others from committing similar crimes and so the crime rate will fall. If punishment was not imposed for some particular behavior, presumably there would be an increase of that sort of "crime". The rehabilitationists, on the other hand, would emphasize that the main purpose of punishment is that it gives the officials of the state an opportunity to reform the criminal. Presumably, after he is reformed, he will not commit crimes again. Similar statements could be made for each of the sub-categories of the utilitarian position. There is no purpose in an indepth investigation of the various versions of the utilitarian positions here. Primarily, the literature discusses utilitarianism as a reaction to the retributivist position.

(C) Issues Arising Out of These Positions.

The controversy between the retributivist position on the one hand and the utilitarian position on the

other has been, and is, the arena for the airing of a number of issues of philosophy. These issues range from points pertinent only to law and law-making to points that are basic to our view of what life is all about anyway and how we picture ourselves within the life process. Some of these issues survive because most of the writers have taken an either/or approach to the problems. Whether or not the statement made by Mabbott that "the central difficulty (of both the reform and deterrent versions of utilitarians) is that both would on occasion justify the punishment of an innocent man"[16] is true depends, in a large part, upon one seeing either retribution or utilitarianism as THE theory justifying punishment to the exclusion of its rival. If, as I am going to argue, both theories have their place in the general justification of the current practice of punishment then the criticism may not apply at all to the situation at hand. Other issues will have to be answered mostly on a basis of belief and not on logical analysis. Whether ethical rules are to be seen as the result of an intuitive process or whether they are the result of an evaluation of the least amount of mischief resulting from any particular act will not be resolved by logical analysis. Such a decision is made on the basis of belief, not logic. That is not to say

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[16] J. D. Mabbott, Op.Cit., p. 39.

that they are not important; they are, but the truth of the position is not open to factual analysis.

Other issues are really trivial upon investigation. For example, retribution has been criticized as being the infliction of pain for pain's sake. Mundle has responded by saying that retribution is the infliction of " ... pain for justice's sake."[17] It really does not matter very much which side one takes regarding that question. The theories will not maintain or collapse regardless of which view of punishment one takes--pain or justice. It is still punishment and the character of the punishment is not what is at issue.

There are, however, two areas that are both interesting and germane to the problem of justifying the practice of punishment. Those are: first, whether retribution is a moral doctrine or simply a definitional extension of the meaning of "punishment". If it were found that it were simply a definitional point, then the retributivist position would only be a tautology and would go nowhere. Second, it is very interesting to see how each of these positions regards

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[17] C. W. K. Mundle, Op.Cit., p. 74.

the offender, and what implications this view has for the sentencing process.

(D) Is Retribution A Moral Doctrine?

The most basic issue in the literature, one that has to be resolved before the discussion can continue, is whether the retributive position is to be regarded as simply a definitional point or whether it is, in fact, a moral doctrine.[18] If the criticism aimed at the retributivists (that punishing those persons who broke the law because they broke the law is actually a corollary of the law or rule itself) is valid, then the whole retributivist argument, while it cannot be challenged because of its logical truth, would add nothing to the theory of justification of punishment. It would simply be stating the obvious, and a point contained within the general concept of what laws, rules and punishment is all about.

There are two arguments that we need to be concerned with here. First, Benn has argued, as Quinton has, that the retributive position is only a definitional point. Quinton, as quoted by Benn, said

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[18] S. I. Benn and R. S. Peters, among others, have argued that this is the case. See S. I. Benn and R. S. Peters, Social Principles and the Democratic State (George Allen and Unwin Ltd., London, 1959), p. 184.

> The infliction of suffering on a person is only properly described as punishment if that person is guilty. The retributive thesis, therefore, is not a moral doctrine, but an account of the meaning of the word "punishment."[19]

And second, is whether guilt is a sufficient condition for punishment. If guilt is not a sufficient condition for punishment, it is argued, then the other conditions that must be added to provide sufficient reason for imposing punishment must be utilitarian in nature, e.g., it will deter others in similar situations, or it will reduce the crime rate, etc. Consider the first argument that retribution is only a definitional point.

When the retributivist answers the question, "Why is that man being punished?", by saying that it is because he broke that rule and that is justification enough, the answer, as it stands, could be taken as a logical point of definition or taken as an ethical statement. If it is taken as a definitional point only, it means that punishment is implied in rule-breaking itself. That means that to say that the man broke the rule is to say at the same time that he is, therefore, liable to punishment. And that is certainly one of the things that the retributivist is saying. However, that is not all that he is saying. If it

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[19] S. I. Benn, Op.Cit., p. 332.

were, the criticism would hold. What is being said is that because the man broke the law we could feel justified in punishing him, provided certain conditions hold. First, he had to act from a position of responsibility. That is to say, the man must be a responsible moral agent; he had to have control over his own actions before we would feel justified in punishing him.

One other condition is that the law must be seen as a basically just law. If the law were not seen as just, the judge would not feel that punishment was warranted. [For example, today there is question as to whether society, through the law, has the right to invade a person's privacy. This question, if it is resolved in favor of protection of each person's privacy, will have effects upon surveillance laws as well as possession of drug laws, except for trafficking. The supreme court does not feel justified in harsh sentences for persons convicted of possession of restricted drugs for their own use at the present time, as a rule. Until there is a more definite attitude regarding the question of what a person can do with his own life, the courts will not see those particular laws as being very just laws and so, while some sentence may be necessary, very light fines are the rule rather than the exception, at least where cannabis possession is concerned.]

The most fundamental condition though is whether it is felt that punishment is warranted in a particular instance or not. The evaluative criterion here is criminal desert. Desert can, presumably, be evaluated. It can swing the balance in either a negative or positive way. If the man acted with "malice of forethought" and went ahead and broke the law anyway, providing that there are no extenuating circumstances (he was out of work and had to get money to feed his family), he is liable to the maximum penalty the law can impose, and we would feel justified in awarding that sentence to him.

So, while the retributivist is saying that the man is being punished because he broke the rule, much more than that is being said. Before punishment can justly be inflicted, there have to be some evaluations made regarding the man and the act in question. These evaluations are not definitional in nature, rather they are ethical evaluations. Therefore, the criticism that the retributivist thesis is only a definitional point, that punishment is simply a definitional extension of law breaking, does not hold.

On the question of whether guilt is a sufficient condition for punishment, Benn says " ... it is in no sense necessary that a person who is blameworthy should

also be punishable." And also that " ... if the conditions of blameworthiness cannot be assimilated completely to the conditions for punishment, moral guilt cannot be sufficient condition for punishment." He adds "We blame liars, but unless, e.g., they make false tax returns or lie in a court of law, we should not feel bound to punish them."[20]

The confusions in these statements can be seen by understanding what the differences are between "guilt," "blame," and "punishment." To say that a man is guilty is to say that he is the person who broke the rule, regardless of whether that rule is legislated and institutionalized (as in legal rules like criminal law), institutionalized but not legislated (as in rules of behavior such as might be found in a private men's club), or neither legislated or institutionalized (such as the common household tenet "you should not lie"). "Blame" is what results from a person being identified as guilty of breaking any rule fitting in the above categories. "Punishment," as Benn is using it, is reserved for the ritualized infliction of penalties resulting from guilt having been established. "Punishment," though, can be and is applied to a variety of non-ritualized situations. What Benn is referring to

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[20] Ibid., p. 333.

is an extension of legal punishment only. (He would include punishments meted out in organizations within his understanding of the term, I think.) Now we do blame guilty persons and sometimes that blame is the only punishment they receive; other times they may also be sent to prison, or fined, or whatever punishment is decided upon for that particular instance. What is important to see is that "blame" is simply another word for a particular type of punishment. It is more usually found as the punishment in the non-institutionalized and non-legislated situations. To say, in a court of law, "I sentence you to three years of prison, and I blame you for breaking and entering" would be a very curious sentence only because to sentence a man is also, and is always, to blame the man. Blame necessarily is "assimilated completely" into the concept of punishment. Benn's point dissolves when "punishment" is not restricted in definition to near legal usages of the term. When the word is taken to include all forms of punishment, as it is daily in ordinary language usage, the relationship between "blame" and "punishment" is clearly seen.

We have seen how blameworthiness can be, and in fact is, completely assimilated into the conditions for punishment, but that does not mean, as Benn has

suggested, that moral guilt is a sufficient condition for punishment. Considering moral guilt and guilt under the law, there are three logical categories to analyze: laws or rules that are both moral and legal rules, laws or rules that are moral rules but not legal rules, and laws or rules that are legal rules but not moral rules. There is nothing to say that all legal rules are also moral rules. Some laws against importing more than $100/yr. duty-free, for example are the result of political-monetary interests. Those are not moral considerations.

In some cases moral guilt is a sufficient condition for punishment,[21] but not all moral offences are covered by legal statutes. Such offenses as lying are dealt with outside of the legal framework but are nonetheless punishments if there is an offender being punished for an offence by a person in authority.

But when one considers the legal context, the retributivists would not like to think that guilt, either moral, legal, or both, would be a sufficient condition for punishment. They want guilt to be a necessary condition, but they also want to consider the amount of criminal desert involved in the

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[21] In family situations, for example, if a child broke a moral rule (don't lie to your parents) it could be taken, and often is taken, as a sufficient condition to inflict punishment.

commission of the act. They want to know if, and to what extent, the man was acting as a responsible moral agent at the time of committing of the crime. Other conditions are necessary as well before the retributivist would impose penalty. In particular, they want to be sure that the rule under which the punishment is being inflicted is a just rule.

Rather than showing, as Benn and Quinton have suggested, that the meaning of "punishment" describes the retributivist position completely, what they have shown is only that guilt, as stated in the definition of punishment, is a necessary condition of any action that is properly described as punishment. If what they say were true, then punishment would imply guilt, but guilt would also imply punishment, and this is not so. Just because someone is guilty does not mean that he <u>will</u> be punished; it only means that he is <u>liable</u> to be punished if the authority feels it necessary to punish the offender on a basis of criminal desert in the legal situation, for example, among other possible factors, or (say) willful disobedience in the school or family situation. The retributive position is not, therefore, simply a definitional point.

(E) The Offender.

Retribution, as we have seen, demands that the offender be seen as a responsible moral agent. It has even been argued, Quinton says,[22] that it is the offender's right to punishment. That to not recognize the offender as a member of the society and therefore subject to its laws, including the punishment provided for in the laws, would be to transgress the rights of citizenship each of us has and to regard the offender as something less than a member of the society. This is probably stating the position more strongly than most retributivists would like, but it still remains that the retributivists would argue strongly against any point of view that did not regard the offender as a responsible moral agent. As Acton has said, "He may not like imprisonment, but he may think it less humiliating than being sent to hospital to have something done to his brain or his testicles."[23] By being punished under the law the offender sees himself as responsible, provided the punishment is not that he be reguired to undergo psychiatric therapy or subject himself to medical operations or the like, but rather

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[22] Anthony M. Quinton, "On Punishment, (1954), in H. B. Acton, The Philosophy of Punishment, p. 57.

[23] H. B. Acton, The Philosophy of Punishment, p. 23.

that the punishment be the removal of freedom or the imposition of a fine or the task of labor or the like. Punishment of this sort is appropriate and in keeping with the view that the offender is a responsible moral agent.

The main utilitarian positions do not regard the offender in this way. By the very fact that he has committed an offense, which society has seen fit to restrict, the offender has given up his right to responsibility.

If we take the view most often taken in the literature, of the justification for punishment being either retributive or utilitarian to the exclusion of the other theory, then we see that the utilitarian positions do not regard the offender as a responsible moral agent. The reform version, for example, holds that the reason we punish people, and in particular send them to jail, is so that the army of counsellors and social workers can have a free hand at rehabilitating the offender. He really has no choice as to whether or not he wants to be helped by these people; he will be helped and that is all there is to it. The view that we punish persons because we want to protect society from the cancer of crime, while regarding the offender in a different way than the rehabilitationists, still does

not give the offender the right to responsible decisions. They cut the man out of society, disenfranchise him, for the period of his incarceration. This sort of social surgery does nothing to help the offender to maintain his identity.

Whether the deterrence version necessarily strips the offender of his responsibility depends upon who is being deterred. If it is the general mass of society, or in fact anyone other than the offender that is the prime focus of deterrence, then the offender is simply the tool used to gain that end. His personal integrity is not at stake and need not be considered. If, on the other hand, it is the offender himself that is being deterred (from committing further crimes upon release), then we can imagine that it is because of a rational decision on his part that he eventually arrives in the position of a responsible law-abiding citizen. Usually, however, the proponents of deterrence are more concerned that persons other than the offender are deterred from committing like crimes. And this position uses the offender for other ends.

If we take the view that justification is an either/or situation, then we must be able to reconcile ourselves with a basically unacceptable position in the end. If retribution is <u>the</u> justification, we are in a

very awkward situation as regards saying how we decide upon having laws that demand punishment. The retributivist is not able to say, except on a basis of intuitive ethics, why we punish certain classes of offence (murder, say) more severely than other classes of offence (theft over $200, say). The amount of criminal desert may be exactly the same in two instances, one from each class, both men planned their crime meticulously, both acted with malice of forethought, and both knew that what they were doing was against the law; yet one man gets life in prison, or may be hanged, while the other is charged with restitution and a six-month probation. Nothing in the theory of retribution will give us reason for this situation. While the retributivist would say that there should be a correspondence between the crime and the desert, there is no appropriate scale of values, save through intuitive ethics, that would set up the requisite correspondence.

Utilitarianism, on the other hand, cannot say why two persons charged with the same crime receive different sentences. Since they each committed a crime, each is a good example for deterring others from committing that crime. Also, both need rehabilitation as both have deviated from acceptable behavior. And society can do without both of them because of their

deviance from the norm. Utilitarianism is not in a position to justify why the first offender should be sentenced much more lightly than the recidivist. Further, it cannot say why any particular instance of punishment was effected. To say that such and such a person was sent to prison because he will be a good deterrent example for other persons likely to commit that particular crime is not a very strong justification when the concept of moral desert and guilt under the law are removed from the justification.

Sentencing under a completely utilitarian system of punishment would result in some different situations than we have at present. If, for example, reform is to be the main reason for punishing persons, then the sentence would have to be geared to an evaluative procedure for estimating the state of the criminal's disposition at any particular time. If the man, according to the evaluation, has reformed, then he should be released. If not, then not. This sort of sentence is called an indeterminate sentence and has been tried both in England and the United States. The result of this approach has been that no one in the structure has been prepared to say that the man has been rehabilitated, and so he stays in prison virtually forever. Crimes such as violence against persons and sex offences have been the main targets for the indeterminate sentence.

In the province of British Columbia, a type of indeterminate sentence is currently being used. Persons can be sent to prison for a definite amount of time plus an indefinite amount of time, 18 months definite and 18 months indefinite, for example; the theory being that if the person has shown good behavior while in prison and has made some attempt at improving himself, with education say, then part or all of the indefinite part of the sentence is forgotten. This is quite a different approach from the indeterminate sentence. The criterion for evaluation of the indefinite sentence has little or nothing to do with rehabilitation as it is usually conceived, but rather is based upon the man's "going along with the program." If he presents no problem to the authorities and makes some effort at learning a trade or improving his schooling, then he is rewarded for his efforts, whereas the indeterminate sentence is based upon an evaluation of what the man is likely to do in the future. And who is qualified to comment on that for anyone?

The assumption behind the deterrence version is that the harsher the sentence, the more deterrent effect will result. Deterrence, then, would have generally harsh sentences compared to the retributive approach. Further, as we saw earlier, deterrence by

itself would not be able to evaluate the amount of moral desert involved in any particular instance of law-breaking behavior. The first offender would not be punished any differently from the recidivist. Both would have the same deterrent effect upon the larger society.

Sentencing procedure under a strictly utilitarian theory of crime and punishment would result in what are really unacceptable types of sentencing. Perhaps if and when the social workers and psychologists are able to evaluate and predict human behavior with some fair degree of assurance, sentencing procedures such as those that would result from a basically utilitarian approach would be effective. At present, however, the tools are not there for that sort of evaluation.

A further criticism of a thorough utilitarian approach to the problem is that those persons usually considered to be not liable to punishment, insane, children, etc., as Bentham suggested, would not necessarily be exempt under a system that did not require moral responsibility as one of the necessary criterion for punishment liability. There would be just as much deterrent effect to punish someone who was insane if he committed a criminal offence as there would be deterrent effect in punishing persons who were morally responsible that committed the same act. Benn and Peters have said

that "The same man contemplating murder gets no encouragement if a homicidal maniac escapes punishment, since the defense of insanity would not be open to him."[24] It is precisely because of the encouragement that a man gets when the "homicidal maniac" escapes punishment that the plea of temporary insanity has not been allowed in the courts. If it were allowed, many men would use that plea. Responsibility for one's actions is the only way that the courts can justify not punishing the insane man and punishing the sane one for the same sort of act. The utilitarian theory is no better off in this area without the use of the retributive theory than is suggested in Mabbott: "The central difficulty of (the reform and deterrent versions) is that both would on occasion justify the punishment of an innocent man."[25] Even if we allow that the punishment of innocent persons is an unlikely thing to have happen deliberately (although there is no doubt that it happens fairly regularly by mistake), we cannot dismiss the fact that the reform and deterrence versions of utilitarianism would justify the punishing of persons, though technically not 'innocent,' usually not considered liable for punishment.

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[24] S. I. Benn and R. S. Peters, Op.Cit., p. 191.

[25] J. D. Mabbott, Op.Cit., p. 39.

IV. SUMMARY

Neither retribution nor utilitarianism is able, individually, to account for, and to justify, the practice of punishment as it currently is practiced. A rather long quote from a piece by Acton illustrates the process:

> The crime having been committed, the culprit having been identified, what is being done in punishing him?
>
> A considerable variety of things, it would seem, and in varying degrees. Most fundamental of all, perhaps, is the vindication of the law (although it might be said to be vindicated merely by apprehension, trial, and admonition). The wrongdoer is being given his deserts, or receiving retribution, expiating the wrong he has committed. He is being protected from the violence he would suffer at the hands of the public at large if nothing were done to him by the public authorities. He is being educated; he is getting opportunities for reform and rehabilitation; he is being deterred from repeating his offense. The population at large is being educated in the basic requirements of life in its community, and is being deterred from committing similar crimes. It is being reassured that crimes are not committed with impunity. The victim, too, is being reassured that he has public support, and that he need not fear an indefinite number of assaults of his rights. It is being publicly registered that such things ought not to be done.[26]

If neither of the most popular theories of justification of the practice of punishment is adequate, we are really not very much further ahead in answering the question of how we are to justify the practice of punishment, if at all?

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[26] H. B. Acton, in Punishment: For and Against (Hart Publishing Company, Inc. New York, New York, 1971), p. 45.

CHAPTER IV

CONCLUDING REMARKS

The Utilitarian position was originally established by Bentham in the early 1800's. While his arguments are in common use even today, we tend to overlook the main reasons for his writing at the time and in the manner he did. The prisons at that time were shameful places. The measures used by the authorities to deal with the prisoners were barbaric. Nearly 100 offences were punishable by death. These capital crimes ranged from as simple an act as stealing a loaf of bread or picking someone's pocket to, of course, murder. No one doubts now that the very punitive penal measures in common use at that time needed a strong critical reaction. Prison reform had to be accomplished somehow. The Utilitarianism of Bentham and Mill was the main driving force behind the necessary movement against the excessively harsh measures of the time.

It has been almost 200 years since the arguments against those harsh penal practices were conceived. Those arguments, of course, have become the stock-in-trade of the current breed of Utilitarians. Since that time, the climate of the moral environment has undergone sweeping changes. Now, humanitarian influences have gained,

at the very least, their fair share of the available ground. The rise of the social sciences has moved hand in hand with the change in attitudes regarding our fellow man. It is a chicken and egg sort of thing. Perhaps the social sciences have caused the change, or perhaps the change has given rise to the social sciences--it doesn't really matter which way it worked. The essential fact is that a dramatic change in our attitude to human action has taken place.

Instead of there being roughly 100 crimes punishable by death, now, only one, the willful killing of a peace officer, is a capital offense. Prisons have changed from the dungeons, or near-dungeons, they once were to a much more acceptable physical plant. Some of the modern prisons are built to be relatively comfortable places to spend time, restricting only a man's freedom and contact with the outside world, inflicting a minimum of physical hardship on the criminal. Parole boards, and volunteer societies, such as the John Howard Society, devote their whole attention to helping the criminal re-enter society once he has completed serving his sentence. These are but a few of the large scale changes that have occurred since Bentham wrote.

Although some of the main points in what is now called the retributive position have been in play for

hundreds of years, retribution has not been recognised as a moral theory in its own right until relatively recently. Emmanual Kant wrote his discussions on punishment from a predominantly retributive stance. Elements of the retributivist position certainly were used in the administration of justice at Bentham's time. It is perhaps from that beginning that the two theories of the justification of punishment have been pitted one against the other. In philosophy, focusing as it does on the substance of the argument and not as much on the social context of the discussion, the controversy still rages.

Outside of philosophy, and in the social context, it seems the pendulum of social change has swung too far the other way. It used to be, in Bentham's time, that there were no humanitarian influences in the administration of justice. Now, many people feel that the principles of the retributive position are being overlooked. As one example, the retributive cornerstone concept of a person being held responsible for his own actions, in Lady Barbara Wooton's words, is being withered away. Only recently, the Supreme Court of Canada has allowed the defense argument of temporary insanity to be used successfully in court. The courts are also quite sympathetic when the defense argues that the accused should not be dealt with harshly because of the terrible

conditions of the offender's background. While these may be valid arguments in some cases, it is a dangerous precedent to establish. Our adversary system, based on precedent as it is, fosters the disturbing habit of obeying the rules of the day and the established precedents to the detriment of the actual truth of the situation. There is a great difference between legal truth and truth outside of the courtroom. To allow the concept of responsibility for one's own actions to be sidelined, seems to me to be opting for the side of legal truth, and not searching out what happened. Surely there is no doubt about which of these is the preferred "truth".

The basis for presenting the case to the jury in our courts has now become a contest of lawyers arguing around procedural rules with arguments based on the precedents. The climate that is established excludes the non-legal person to the point that ordinary common sense considerations are obscured. In this sort of climate, it is a simple thing to ignore, or forget about, the retributivist position that the individual should be held responsible for his own acts except in those cases where extenuating circumstances actually exist.

I am not, and would not, argue that humanitarian considerations should therefore be dismissed. What I am saying is that retributive principles, such as

responsibility for one's own actions, should not be dismissed. It seems to me that it is a very serious mistake to not expect the individual to act in a responsible manner. The moment we say that the individual could not help his anti-social act, or when we say that he only possibly could have helped doing as he did, and therefore he should be treated in a manner that reflects his inability to take care of himself, then we are dismissing the requirement for self-controlled, law-abiding behavior and are inviting the antisocial behavior to continue. The effect of that argument is to provide an excuse that will fend off the administration of justice in that case and substituted a bad legal precedent for anyone else to follow.

From a purely philosophical position, the retributivist theory of the justification of punishment is logically superior to the Utilitarian position. It is easier to defend, and is definable. In fact, the cold logic of the retributive position may be one of the reasons the Utilitarians oppose it as strongly as they do. But be that as it may, the fact remains that neither of these positions is able to give a strong theoretical basis for the social fact of legal punishment as is practiced in contemporary Western society today. At least neither can do that by itself.

Life, I have heard, is larger than logic. Social problems, being a part of life rather than logic, are too complex to be settled by the logic-chopping methods of philosophy. When it comes to the root questions about the justification of the social fact of punishment, the questions certainly are too complex to be settled, once and for all, by philosophy logic-chopping. The philosophers are not able to agree on many of the central terms one would have to involve in such a discussion. Concepts like "justice", "desert", "right" and "wrong" are able to dodge the direct attack of definition. Even when a suitable definition is expressed at one time, it may not be accurate at a later date.

Although we may not be able, as philosophers, to define the required central concepts accurately, we should not as social beings ourselves ignore the important social issues. Judging from the ongoing dialogue about punishment in Canada today, there is no doubt that there is a need for clarification of the underlying principles. If this thesis has contributed nothing original to the philosophical discourse on punishment, it has tried to explicate the theoretical basis for two questions central to what we do about punishment. First, it has attempted to show how the definition of punishment itself can be used to evaluate certain lines of argument.

Actions that might loosely be called punishments can be shown, by a careful application of the definition, to be something other than punishment.

Second, this thesis has attempted to show how the two main theories of justification of punishment describe different activities within the social practice of criminal justice. Retribution is directed at providing a justification for the individual instance of punishment; while Utilitarianism attempts to provide answers about aspects of the origin of the laws, the methods of treatment of persons after conviction, and the reasons for maintaining law and order in our society.

All of these are important areas of concern. My concern in this thesis, therefore, has been to only point the way towards how the points raised in the philosophical controversy between Retribution and Utilitarianism can be applied to the social fact of criminal justice as it is practiced in Western society today.

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